Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-491

UNITED STATES OF AMERICA,
Petitioner

—*v.*—

LINDA AGURS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED SEPTEMBER 29, 1975
CERTIORARI GRANTED NOVEMBER 17, 1975

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-491

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—*v.*—

LINDA AGURS

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* The opinion of the court of appeals below, the statement of five judges below dissenting from the denial of the government's petition for rehearing *en banc*, and Judge Leventhal's statement on why he voted against rehearing *en banc*, are contained in the Petition for Certiorari.

DOCKET ENTRIES

CRIMINAL DOCKET

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Cr. No. 2081-71

UNITED STATES

vs.

LINDA V. AGURS

DATE	PROCEEDINGS
1972	
Apr. 27	Called for trial; deft not present; trial continued. ROBINSON, J Rep-D. Spencer Robert Gaston, Atty
Jun. 28	Motion for issuance of subpoena, GRANTED. ROBINSON, J.
Jul. 5	Jury and 2 alts. sworn; trial begun; respited until 7-6-72 at 9:30 a.m. Remanded to custody, ROBINSON, J. Rep: D. Spencer R. Gaston, Atty.
Jul. 6	Juror No. 9. Bessie R. Jordan excused; Alt. Juror No. 1, Carrie M. McCrae takes seat No. 9 in jury box: Trial resumed; respited until 7-7-72 at 10:00 A.M.; rem. Reporter—D. Spencer; Robert T. Gaston; ATTY; ROBINSON, J.
Jul. 6	Motion for issuance of subpoena-GRANTED-ROBINSON, J.
Jul. 7	Trial resumed; same jury; Alt. Juror excused; VERDICT: GUILTY AS CHARGED; Jury polled & discharged; referred; remanded to custody.
	Note from jury filed. Accommodations for lunch ordered & issued for 12 Jurors & 2 Deputy Marshals. ROBINSON, J. Rep-D.Spencer Robert T. Gaston, Atty

DATE	PROCEEDINGS

Oct. 20 SENTENCE: (Mur. II) Five (5) years to Twenty (20) years; Remanded to custody Judgment and Commitment. ROBINSON, J. Rep: D. Spencer R. Gaston, atty.

Oct. 20 Notice of appeal from sentence of OCT. 20, 1972.

Oct. 25 Copy of docket entries sent to USCA & US Atty. Copies of notice of appeal sent to USCA, US Atty, Atty, and deft.

Oct. 20 Notice of appeal from sentence of 10-20-72. (error)

Oct. 27 Authorization for transcript of trial on July 5, 6 & 7. ROBINSON, J. #45741.

Nov. 13 Certified copy of ORDER USCA dated 11-13-72 appointing Robert T. Gastor & directing Clerk of District Court to transmit the record as promptly after the filing of transcripts as business of office permits.

Nov. 20 Record on appeal delivered to USCA; In forma pauperis (Clerk's fee $1.00) Receipt from USCA for original record

1973

Jan. 30 TRANSCRIPT of proceedings of 7-5-72; pages 1-48; Court's copy; Rep-D.Spencer TRANSCRIPT of proceedings of 7-6-72; pages 49-157; Court's copy; Rep-D.Spencer TRANSCRIPT of proceedings of 7-7-72; pages 158-191; Court's copy; Rep-D.Spencer

Feb. 1 Supplemental record on appeal delivered to USCA; receipt acknowledged.

Feb. 5 Letter dated 1-16-72 in the nature of Motion for reduction of sentence, FIAT. ROBINSON, J.

Feb. 7 Motion for new trial; c/s; p/a.

DATE	PROCEEDINGS

Feb. 20 Government Opposition to motion for new trial; Attachment 1; c/s (Attachment 2 to be attached when obtained)

Feb. 28 ORDER denying motion of deft for new trial without prejudice. (N) ROBINSON, J.

Mar. 12 MOTION for reconsideration of motion for new trial; c/s; p/s.

Mar. 30 ORDER denying motion of deft for reconsideration of motion for new trial. (N) ROBINSON, J.

Jul. 24 MOTION of Defendant for new trial; Defendant's presence waived; heard & denied. ORDER denying Defendant's motion for new trial. (N) Exhibit of Defendant to motion for new trial, filed. ROBINSON, J. Rep-D. Spencer Robert T. Gaston, Atty

Aug. 3 NOTICE of appeal from denial of deft's. motion for new trial.

Aug. 3 COPY of docket entries sent to USCA & US Atty. Copies of notice of appeal sent to USCA, US Atty, Atty, and Deft.

Aug. 6 RECORD returned from USCA; receipt acknowledged.

Aug. 7 ORDER authorizing transcript of motion for new trial on 7/24/73. (Spencer) ROBINSON, J. #100751

Sept. 4 RECORD ON APPEAL delivered to USCA; receipt acknowledged.

Sep. 24 TRANSCRIPT OF PROCEEDINGS of July 24, 1973; Pages 1-23; Court copy; Rep-D.Spencer

Sep. 27 SUPPLEMENTAL RECORD ON APPEAL delivered to USCA; receipt acknowledged.

Nov. 7 CERTIFIED copy of Order USCA 11-5-73 appointing Robert Gaston.

DATE	PROCEEDINGS

1974

Jan. 18 CERTIFIED copy of Order entered USCA 1-16-74 vacating Robert T. Gaston and appointing Sherman Cohn as counsel.

Feb. 22 MOTION for new trial; P/A; Affidavit and attachment; C/S MOTION for Order permitting student counsel to argue Motion for new trial; P/A; Attachment (2); C/S

Mar. 8 ORDER authorizing transcript of Calendar Call on 1-10-72. (Rep: D.Spencer) #137125 ROBINSON, J.

Mar. 12 OPPOSITION of Government to Motion for New Trial; C/S

Mar. 18 REPLY to Opposition to Motion for new trial; C/S

Mar. 25 TRANSCRIPT OF PROCEEDINGS of 1-10-72; Pages 1-8; Court copy; Rep-D.W.Spencer

Mar. 27 PRAECIPE entering appearance of Edwin J. Bradley as Co-Counsel with court-appointed counsel in U. S. C. A.

Apr. 1 SUPPLEMENTAL RECORD ON APPEAL delivered to USCA; receipt acknowledged.

Apr. 12 PETITION for Writ of Habeas Corpus ad Prosequendum for defendant (FIAT). BRYANT, J. FINDINGS, Order and Writ of Habeas Corpus ad Prosequendum to Federal Reformatory for Women. Alderson, W. Va. for defendant for 4/17/74. (N) BRYANT, J.

Apr. 17 MOTION for new trial, heard & taken under advisement; (defendant not present). ROBINSON, J. Rep-G.Fedoration E.J.Bradley, A.Rubenstein & R.T. Gaston, Attys

DATE	PROCEEDINGS

May 7 ORDER denying defendant's motion for new trial. (N) ROBINSON, J.

May 17 NOTICE OF APPEAL from Order denying motion for a new trial of 5-7-74.

May 17 Copy of Notice of Appeal to USCA and U. S. Attorney. Copy of docket entries to USCA, U. S. Attorney, Attorney and Defendant.

May 20 ORDER authorizing transcript of motion for new trial on 4-17-74. ROBINSON, J. Rep. G. Fedoration No. 137116

May 30 CERTIFIED copy of Order USCA dated 5-29-74, appointing Sherman Cohn as counsel for defendant, and directing Clerk of District Court to transmit the record as promptly after filing of transcript as business of office permits. CERTIFIED copy of Order USCA dated 5-29-74, consolidating No's 72-2072, 73-1956 and 74-1542 for all purposes.

Jun. 18 TRANSCRIPT OF PROCEEDINGS of 4/17/74; pages 1 thru 33; Court's copy. (Reporter E. T. Fedoration)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Sworn in on October 6, 1971

Criminal No.

Grand Jury Original

THE UNITED STATES OF AMERICA

v.

LINDA V. AGURS

Violation: 22 D. C. Code 2403
(Second Degree Murder)

The Grand Jury charges:

On or about September 24, 1971, within the District of Columbia, Linda V. Agurs, with malice aforethought, did stab, James T. Sewell, with a knife, thereby causing injuries from which the said James T. Sewell did die on or about September 24, 1971.

A TRUE BILL:

Foreman.

Attorney of the United States in and for the District of Columbia

Copy for:

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 2081-71

UNITED STATES OF AMERICA

vs.

LINDA V. AGURS, DEFENDANT

January 10, 1972
Washington, D.C.

Calendar Call and Bond Review Hearing held before the Honorable AUBREY E. ROBINSON, JR., United States District Judge.

APPEARANCES:

JOHN O'B. CLARKE, Esq.
Assistant United States Attorney
For the Government

ROBERT T. GASTON, Esq.
For the Defendant

DOYNE W. SPENCER
Official Reporter

[2] PROCEEDINGS

THE DEPUTY CLERK: Linda V. Agurs, Criminal Action 2081-71.

(Defendant present.)

THE COURT: This is on for bond review, is that correct, Mr. Gaston?

MR. GASTON: That is correct, Your Honor.

As to the question of bond, Your Honor, while there have been some problems with Mrs. Agurs before with

regard to leaving the half-way house, she has been a lifetime resident of the D. C. area and she has practically all of her relatives living in the area, and when she did leave the halfway house, she didn't actually leave the area.

Furthermore, as to the evidence in the case, I think that Mr. Clarke would agree that there is a substantial defense in the case of self-defense. I personally believe the Government's case is quite weak. I have discussed the matter with Mr. Clark at some length, and that conference with him hasn't changed my opinion at all in that regard.

THE COURT: I don't have in my possession a Bail Agency report.

MR. CLARKE: Your Honor, I have a Bail Agency report.

THE COURT: Could I see it.

MR. CLARKE: Which goes back to September 27th. [3] I will pass it up to the Court.

THE COURT: Would you, please.

What is the prospect of any employment?

Do you want to be heard in this matter, Mr. Clarke?

MR. CLARKE: Your Honor, I would ask that the defendant, if released, be given conditions that would ensure the safety of the community besides her appearance at trial. Those conditions being that she not be allowed to leave the metropolitan area; that she obtain employment; and, also, I would ask that the Court consider work release for this defendant.

MR. GASTON: Your Honor, the defendant has advised me that she can obtain employment within a day or two.

THE COURT: What was the relationship between the decedent and this defendant?

MR. CLARKE: Your Honor, apparently this was, I guess the easiest way to say it would be a prostitute-John relationship. They registered at a tourist home as Mr. and Mrs., and a couple of minutes after they had registered, the altercation broke out from which the decedent died.

We do not know if there was any friendship relationship besides their registering at that time.

MR. GASTON: Your Honor, if I may, I would like to point out one strong piece of evidence, or the most strong piece of evidence towards self-defense. That is, the person [4] who was running the tourist home was hearing screams of help from Mrs. Agurs, and he went to the door of the room and the screams for help continued. Because no one opened the door, he then broke it down and he found the deceased on top of Miss Agurs on the bed struggling over the knife in the matter, and she was still screaming "help" while he was still standing outside the door.

I think there is other evidence of self-defense, but that is about the strongest piece of evidence of it.

MR. CLARKE: Your Honor, I might point out to the Court, as defense counsel knows, the decedent was holding the blade of the knife, whereas the defendant was holding the handle of the knife.

THE COURT: Where would the defendant live if she were released?

THE DEFENDANT: My sister.

THE COURT: The same place you were living before on L Street?

THE DEFENDANT: Yes, sir.

THE COURT: When you were on narcotics, was it heroin?

THE DEFENDANT: Yes, sir.

THE COURT: You went right back to it when you left the half-way house, is that right?

THE DEFENDANT: Every now and then. I didn't have [5] no habit.

THE COURT: How long will it take to try this case?

MR. CLARKE: Your Honor, I anticipate at least two days.

THE COURT: What is your estimate, Mr. Gaston?

MR. GASTON: That would seem to be sufficient, Your Honor. Perhaps two and a half.

THE COURT: I think she is entitled to her release. She will live at 807 L Street with her sisters. Employment within ten days. Not to leave the Metropolitan Washington Area, and undergo narcotics surveillance. Any positive test for any kind of narcotics will bring you

right back here, Miss Agurs, right back here, and I am going to revoke the bond at that point, and you will await trial in jail if you bother with narcotics.

Now, she will have to contact the bail agency at least once a week by telephone and her lawyer once a week by telephone so he can get this case ready for trial.

Mr. Clarke, you wanted to say something?

MR. CLARKE: Your Honor, you have covered the condition I was about to offer.

THE COURT: If you prepare such an order, Mr. Gaston, and explain it to Miss Agurs very carefully, I will sign it.

MR. GASTON: Yes, Your Honor.

[6] In addition, we are here for a hearing on motions today. There are no motions to be filed. As I stated earlier, I had a rather lengthy discussion with Mr. Clarke and we have reached a substantial agreement as to discovery matters, and I was wondering if we might place that agreement on the record at this time.

THE COURT: If it is necessary. Have you had all of the discovery you want?

MR. GASTON: Well, not all, Your Honor, primarily because Mr. Clarke does not have it all in his possession at this time, such as photographs and things of that nature, physical evidence. But he has indicated his willingness to turn them over to me upon his receipt.

THE COURT: It has been this Court's experience we have never had a problem in that regard.

MR. GASTON: I have never had any, Your Honor.

THE COURT: If you have any, let me know.

MR. GASTON: Yes, Your Honor. Mr. Clarke has also agreed to hand me the grand jury minutes one week before trial. Is that not right, Mr. Clarke?

MR. CLARKE: Yes, Your Honor.

Your Honor, I might also point out that I have sent defense counsel a copy of the autopsy.

MR. GASTON: Then I will make this out.

THE COURT: If you will, I will pass the matter [7] until you do.

(At this point the Court proceeds momentarily with other business.)

THE COURT: Have Miss Agurs come up.

(The defendant comes to the podium.)

THE COURT: Now, when you get a job, you are supposed to notify the bail agency right away so that they know who your employer is. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And tell Mr. Gaston, also.

THE DEFENDANT: Yes, sir.

THE COURT: Now, if you violate any of the conditions of your release, back you come. And that includes getting arrested for anything else. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: If you fail to show when you get notice, now, notice is going to be sent to you at 807 L Street, and that is Apartment 2, is it not?

THE DEFENDANT: Yes, sir.

THE COURT: That is where the notices are going to go to you. So you look at your mail every day, because there will be a notice when you are to come back here for trial. And if you fail to appear after you are notified, that might get you five years in jail without regard to this second degree murder business.

[8] Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: I think you do. I think you do. I have ordered that you keep in touch with Mr. Gaston so he can prepare to defend you in this case. He can't do it by himself.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Allegedly you were there with the decedent. Mr. Gaston was not. And you have got to help him in order to help yourself. That is the only way he can do his job.

(Whereupon the hearing was concluded.)

REPORTER'S CERTIFICATE

This record is certified by the undersigned Official Reporter of the United States District Court for the District of Columbia to be the official transcript of the proceedings indicated.

/s/ Doyne W. Spencer
DOYNE W. SPENCER

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 2081-71

UNITED STATES OF AMERICA

vs.

LINDA V. AGURS, DEFENDANT

Wednesday, July 5, 1972
Washington, D.C.

Trial before The Honorable AUBREY E. ROBINSON, JR., United States District Judge, and a jury.

APPEARANCES:

JOHN O'B. CLARKE, Esq.
Assistant United States Attorney
For the Government

ROBERT T. GASTON, Esq.
For the Defendant

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" No. 9	24	
" No. 10	27	
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" No. 1	43	

[3] PROCEEDINGS

(The trial commenced at 2:05 p.m.)

MR. CLARKE: Your Honor, the Government is ready to proceed in the Agurs case.

THE COURT: Mr. Gaston.

MR. GASTON: The defense is ready, Your Honor, as soon as my client is brought out.

Also, I have a couple of preliminary matters that I would like to bring out at this time.

THE DEPUTY CLERK: Linda V. Agurs, Criminal Action 2081-71.

(The defendant enters the courtroom.)

MR. CLARKE: Your Honor, may the record reflect that I have given to defense counsel a copy of all Jencks Act material in this case, including the statement counsel indicated was exculpatory.

MR. GASTON: I have received those items, Your Honor, at this time. I have not had a chance to read them yet.

The first matter which I wanted to discuss is the fact that there is some evidence of narcotics use on the fringes of this case. I don't see how it is at all probative, and I think it would be quite prejudicial to the defendant if statements concerning that use were admitted into evidence.

In talking to Mr. Clarke, it is my impression that he does not intend to have that brought out in the presence of [4] the jury, but I would either like a stipulation from him at this time to that effect, or I would like to make an objection to any such statements in the presence of the jury.

THE COURT: I don't understand what you mean, a stipulation. The Government knows what is probitive and what isn't, and I will rule on any objection made.

MR. GASTON: Once the statement comes out in question—

THE COURT: Mr. Gaston, don't argue with me during the course of this trial. If it is not relevant, the Government has already indicated it has nothing to do with this case and there will be no evidence. You make any objection to any question that suggests it. We have no problems at all with regard to it.

MR. GASTON: All right.

The other item, Your Honor, is that the defendant, Miss Agurs, according to my information, does have a prior conviction, an unauthorized use of a motor vehicle. I believe it was in 1970.

It's a Louck question. I realize that the new statutes permits that to be brought out for impeachment purposes, and perhaps Your Honor would like to delay—I would argue that that statute is unconstitutional, and the grounds for keeping it out would be based on the Louck and Gordon cases.

[5] Perhaps that could, if Your Honor wanted to wait until after the Government's case or now.

MR. CLARKE: Your Honor, I might add that although the defendant was initially charged with unauthorized use of a motor vehicle, there was a conviction of attempted unauthorized use of motor vehicle. This would fall under the misdemeanor section of the new Louck Statutes, and on past decisions, unauthorized use of a motor vehicle does not go to honesty. Therefore, the Government would not seek to introduce this as impeachment.

THE COURT: No problem. This is straight second degree murder, uncomplicated as far as evidentuary problems are concerned.

All right. Is there anything else?

MR. CLARKE: No, Your Honor.

THE COURT: Let's get the jury panel down.

(Voir dire examination of jury panel and the opening statements not transcribed.)

MR. CLARKE: With the Court's permission, the Government will call Mrs. Willetta Sewell.

Your Honor, in order to save time, I would ask that the following articles be marked for identification as Government exhibit numbers 1 through 7.

THE DEPUTY CLERK: Government Exhibit Numbers 1 through 7 marked for identification.

[6] (Government Exhibit Numbers 1 through 7 were marked for identification.)

Whereupon,

WILLETTA SEWELL

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CLARKE:

Q. With the Court's permission, will you please state your name, and speak loudly so everybody can hear you. Will you spell your name for the Court Reporter.

A. Willetta Sewell.

Q. Is that Miss or Mrs?

A. Mrs.

Q. Mrs. Sewell, are you familiar with an individual by the name of James T. Sewell?

A. He was my husband.

Q. When was the last time that you saw your husband alive?

A. About a quarter of three.

Q. What day?

A. September 24, 1971.

Q. Going back to that day, September 24, 1971, about what time was it in the day or night that you first saw your husband?

[7] A. Between ten thirty and eleven o'clock.

Q. Do you know where your husband was working during that couple of days before and on that day, if any place?

A. He was working at the George Washington University Hospital in the housekeeping department. He was off on that Friday.

Q. Friday would be September 24th?

A. Yes, it was.

Q. Going back to that day again, where was it that you first saw your husband on that day, and what time was that again?

A. Down at 14th and New York Avenue, Northwest. It was between ten thirty and eleven. We were down at the Holloway Restaurant.

Q. Is that in the morning?

A. Yes, we were down at the Holloway Restaurant there on the corner of 14th and New York Avenue.

Q. Were you and your husband living together at that point?

A. No, we was not.

Q. Were you or your husband going any place that day?

A. Yes, we were.

Q. Where was that?

A. Well, we went shopping and we were supposed to be leaving at six o'clock going to New York, and from there to [8] Connecticut.

Q. Can you tell us, if any place you and your husband went when you met him at that time at eleven o'clock in the morning?

A. Well, we had lunch first at the Holloway Restaurant there on the corner. We left there and went to Peoples Drug Store.

Q. Try to keep your voice up, if you can.

A. We left there and went to Peoples Drug Store. He bought some after-shave lotion and some deodorant. We walked around to Hahn's which is next door from there around the corner on 13th and G and picked up his wedding band, and we left there and continued walking until we got over on 7th Street. We were just window shopping from store to store. We got over to 7th Street and we went into Hecht's, and went back up, I guess you would call it, north on 7th Street. We stopped at Majors and we ended up, we was at the Peoples Drug Store at 7th and K, Northwest.

Q. Let me go back for a moment. You say you went to pick up his wedding ring. Can you tell us where that took place, if you remember?

A. This was at Spicer's at 13th and G.

Q. What if anything happened when you picked up the wedding ring, what did you do?

A. When we picked it up, we had put it in to have it [9] stretched because he had broke his finger. After we got the ring, it wouldn't go on his finger because his finger was swollen, so he tried and tried to put it on. So the gentleman there at the jewelry store was very kind. He put it on his finger for him.

Q. Now, when it was being placed on your husband's finger, did he say anything?

A. Yes, he told him it was too tight, but the jewelry man insisted that he leave it as it was, and that way it wouldn't come off, but when my husband's finger got back into place, it would be down to the right size.

Q. At this time I would like to show you what has been marked for identification as Government Exhibit Number One. I would ask that you take a look at that particular item. Can you identify it?

A. Yes, this is my husband's ring.

Q. Is that the wedding ring that you were talking about that was placed on his hand that morning?

A. Yes, it is.

Q. Now, when you left your husband later on that day at around a quarter of three, as you testified before, did he still have that ring on him?

A. Yes, he did.

Q. Now, can you please indicate where if any place you went once you got to the Peoples Drug Store, what you did and [10] what happened at that point?

A. When we got to the Peoples Drug Store, we purchased two root beer sodas. I took one and he took his. We went over to catch my bus which was across the street at Hahn's. I was going down H Street.

I got on the Seat Pleasant bus, and he waited until I got on mine, until I caught my bus.

His bus was ready to pull off, so he ran back across the street against the light and got on a 70 Silver Spring bus. He was supposed to be going to his father's house.

Q. Where does his father live?

A. He lives at 12th and Vermont, Northwest.

Q. Now, about what time was it in the afternoon that you last saw your husband?

A. It was a quarter of three.

Q. This was at 7th and New York Avenue, is that correct?

A. Yes, it was.

Q. Now, going back to that particular time and a little bit before hand, did you or your husband have any discussion of money?

A. I didn't understand you.

Q. Did your husband or you have any discussion about whether or not he had any money?

[11] A. Well, we had discussed that. He had told me that we were going to New York, which is true.

Q. Let me ask you this: Did he show you anything?

A. Yes, he did.

Q. Can you tell us about that, please.

A. Well, when we were in Peoples Drug Store, I had put my clothes in the cleaners, and he was supposed to have been getting them out. So he gave me $15 to get my clothes out of the cleaners. And at the time he asked me if I would count his money, which I did, and I counted $360 before he gave me the $15 for the cleaners after which that left him $345, and that is what he was left with when we left.

Q. Did you see where your husband took the money from when he gave it to you?

A. Yes, I did.

Q. Where did he take it from?

A. From his right pants pocket.

Q. Mrs. Sewell, are you familiar with whether or not your husband carried a wallet?

A. Yes, I am.

Q. Do you know if he was carrying a wallet that day, September 24th?

A. Yes, he was.

Q. Excuse me?

A. Yes, he was.

[12] Q. What type of wallet was that?

A. It was a brown imitation alligator wallet.

Q. Do you know if he kept his money in the wallet on that day?

A. No, he did not.

Q. Do you know if your husband had any habit about keeping money in his wallet?

A. He didn't have any habit at all of keeping it in his wallet. My husband never kept money in his wallet, if he had over $5. When he got down to $3, he would put it in his wallet. Otherwise he would keep it in his front pocket.

Q. At this time I would like to show you what has been marked for identification as Government Exhibit Number Two. Can you identify that particular item?

A. Yes, I can.

Q. What do you identify it as?

A. My husband's wallet.

Q. What about the papers that are there?

A. He has a letter that I wrote to him while he was in North Carolina, his insurance policy card, his National Bank card.

Q. Well, let me just simplify matters. They are his identification papers?

A. Yes, they are.

Q. Did you see any of those papers on him that day?

[13] A. Yes, I did.

Q. Mrs. Sewell, are you familiar with what type of clothing your husband was wearing that day?

A. Yes, I am.

Q. What type of clothing was he wearing?

A. He had on his blue work shirt, his blue work pants, a green knitted T-Shirt, black loafers, and he also had on a short western jean jacket.

Q. At this time I would like to show you what has been marked for identification as Government Exhibit Number Three. Will you take a look at that, please. Can you identify it?

A. Yes. They are his work pants.

Q. Are they the work pants that he was wearing that day?

A. Yes, it is.

Q. I would like to show you Government Exhibit Number Four for identification. Can you identify that?

A. Yes. This is his work shirt.

Q. I would like to show you Government Exhibit Number Five for identification. Can you identify that?

A. Yes. That is his T-Shirt.

Q. Was he wearing all of these items on that day?

A. Yes, he was.

Q. Now, are you familiar with what type of undershorts your husband wore, insofar as what are called boxer shorts or [14] briefs?

A. He wore briefs.

Q. I would like to show you what has been marked for identification as Government Exhibit Number Six. Can you identify that?

A. He wore shorts like that. I can't say that those are the ones he had on, sir.

Q. What type of shoes did your husband have on that day?

A. Black loafers. The top, they are not, they are made on the loafer style, but they has a high, sort of high point on them.

Q. I would like to show you what has been marked as Government Exhibit Number Seven. Can you identify that?

A. Yes, I can.

Q. What do you identify that as?

A. Those are his shoes.

Q. Mrs. Sewell, going back to that day, the 24th of September, did your husband ask you to go any place with him during the day itself?

A. Yes, he did.

Q. Will you please tell us about that.

A. Well, he asked me three or four times to go to the tourist home with him.

Q. What tourist home was he talking about?

[15] A. Roberta's Tourist Home out on Benning Road, Northeast.

Q. What if anything did you say to him?

A. I told him I was not going. So he kept insisting, and I still answered him no. The last thing he asked me just before I got on my bus was had I changed my mind, and I told him no, I had not.

Q. Now, at the time you got on your bus, what if anything did you see your husband do?

A. When I got on my bus, his bus, just before pul'ing off, he ran back across the street between the traffic to get his bus and the driver waited for him, and his bus went on and made the light.

Q. Did you see your husband any time after that?

A. No, I didn't.

Q. Did you see your husband's body any time after this?

A. Not until the night before the funeral.

Q. That was your husband's funeral, is that correct?

A. Yes, it was.

Q. Getting back to one more thing: Did you ever see your husband carry a knife?

A. Yes, I did.

Q. What type of knife did he carry?

A. A small black knife about this long, about six or seven inches.

[16] Q. Would you please demonstrate that again so we can see.

A. About this length closed.

MR. CLARKE: Your Honor, may the record reflect that is approximately three inches.

THE COURT: Very well.

MR. CLARKE:

Q. Continue.

A. It was about six or seven inches when it was open.

Q. Did you see if your husband had that knife on him that day?

A. Yes, I did.

Q. Did you ever see your husband wear a knife in a sheath?

A. No, sir.

MR. CLARKE: May I have the Court's indulgence for a second.

BY MR. CLARKE:

Q. You have indicated that your husband stopped at the drug store and picked up some items?

A. Yes, he did.

Q. When you left him that day, did you see what if anything he did with those items?

A. He had them when he left.

Q. What did he have them in?

[17] A. A Peoples Drug Store bag.

Q. What were those items again?

A. Deodorant and after-shave lotion.

MR. CLARKE: I have no further questions, Your Honor.

CROSS EXAMINATION

BY MR. GASTON:

Q. Mrs. Sewell, isn't it a fact that in addition to that pocket knife, your husband very often did carry a hunting knife or hunting type of knife in a sheath that he wore on his belt?

A. No, he did not.

Q. He never did?

A. No.

Q. When was it that you told the police or first told them about the money that your husband had on him that day?

A. When I talked to Detective Horstkamp and Detective Greenwell.

Q. Do you remember when that was?

A. I don't exactly remember the date, sir.

Q. Well, do you have an approximate idea how long after this incident that it was? Was it a week after, a month after, two months?

A. No, it was not.

Q. It was not what?

[18] A. It was not. I can tell you when it was. I came down—I was looking for insurance papers and an insurance card and I talked to Detective Hortskamp and Detective Greenwell. But at the time we did not mention it, and it was approximately a week later that I mentioned

about the money. I asked them about the money, where was it, along with the rest of his things.

Q. So the first time you saw Detective Hortskamp, you didn't mention the money?

A. I didn't mention the money. All I wanted right then was the papers that I needed.

Q. When was the first time that you saw Detective Hortskamp in relation to the time of this incident? Was it a week after this incident, two weeks, or when was it?

A. It was about a week afterwards.

Q. Then it was another week after that that you first mentioned the money to him?

A. No. I saw him—my husband was killed on the 24th and I went looking for his papers the week-end. I talked to him by phone. He told me to come down at No. 1 and to go over there to Homicide and they would ask them about his things.

I did, and I didn't get any consideration whatsoever. So then I goes back to him and I mentioned it to him.

I told him, also, then that he had money on him, but at the time I was nervous and I didn't remember.

[19] Q. All right. Now, do you remember what the date of that occasion was, or approximate date?

A. It was on a Monday.

Q. In the month of October?

A. Yes.

Q. In the first part of October or the last part of October?

A. The first part.

Q. Now, did there come a time—well, let me ask you first: You and your husband had been separated?

A. Off and on.

Q. How long had you been separated this time?

A. The last time?

Q. Yes.

A. About six months.

Q. All right. Had there taken place the beginnings of a reconciliation between you and your husband?

A. Yes, there were.

Q. That was the purpose of the trip to New York?

A. Yes.

Q. Was it for that reason that he had the money with him?

A. Yes.

Q. All right. Are you sure that he didn't give you any of the money?

[20] A. I am positive he didn't give me nothing but $15, sir.

Q. He didn't give it to you to keep for the trip?

A. No. I asked him to, and he said he would keep it himself.

Q. Did there come a time when you went to Buddies Tourist Home after this incident?

A. I went to Buddies Tourist Home afterwards before my husband was buried.

Q. All right. At that time you spoke with some of the people who worked there?

A. Yes, I did.

Q. You spoke with the person who owned it who goes by the name of Mr. Buddy?

A. I wouldn't know, sir.

Q. Does the name Lawrence Smith mean anything to you?

A. I didn't ask any of the gentlemen their names. There was three gentlemen there.

Q. Isn't it a fact that you told those gentlemen that your husband did in fact carry a knife and that he would use it?

A. No, I did not.

Q. You don't recall making that statement?

A. I didn't make that statement at all.

Q. All right. Now, you didn't see the actual incident, [21] did you?

A. No, I did not.

Q. And you have no firsthand knowledge of what happened in that room?

A. I do not.

MR. GASTON: I have no other questions, Your Honor.

REDIRECT EXAMINATION

BY MR. CLARKE:

Q. Mrs. Sewell, when you first were interviewed by the police about a week or so after the killing, did they ask you anything about money?

A. No, he did not.

Q. Mrs. Sewell, did you receive any money from George Washington Hospital?

A. Yes, I did.

Q. What was that money that you received from the hospital?

A. $2,000.

MR. CLARKE: I have no further questions, Your Honor.

RECROSS EXAMINATION

BY MR. GASTON:

Q. When was it you received that money, Mrs. Sewell?

A. It was in November.

Q. Following this incident?

[22] A. Yes, it was his life insurance they paid off. I also picked up a check of his the following pay day for, I think it was $23 or $34, something like that.

MR. GASTON: I have no other questions, Your Honor.

MR. CLARKE: I have no further questions, Your Honor.

THE COURT: You may step down.

(The witness steps down.)

MR. CLARKE: Your Honor, may I have the Court's indulgence for a second.

Your Honor, I at this time, with the Court's permission, I would like to announce a stipulation.

THE COURT: Very well.

MR. CLARKE: The stipulation will be as follows, Your Honor: It is agreed between the defense and the Government that if Evelyn B. Thomason were called to testify, she would testify as follows: That she is employed by George Washington University Hospital. That she

has care, custody, and control over employment records. And those records would show that on September 24, 1971, James T. Sewell was given a check from George Washington University in the amount of $143.13. And that check would show that it was endorsed by James T. Sewell.

At this time, Your Honor, I would ask that this item [23] be marked as Government Exhibit Number Eight for identification. I will show it to counsel.

THE DEPUTY CLERK: Government Exhibit Number Eight marked for identification.

(Government Exhibit Number Eight was marked for identification.)

MR. CLARKE: A further part of the stipulation, Your Honor, is that Government Exhibit Number Eight is a true and accurate copy of the check that George Washington University made out to James T. Sewell on September 24, 1971.

(Government Exhibit Number Eight was received in evidence.)

THE COURT: That is a stipulation, ladies and gentlemen. In other words, there is no other evidence needed about that fact. He got this check from George Washington University in the amount of $143.13 on September 24, 1971, and the check was endorsed by him, and that is a true and accurate copy of that check.

MR. CLARKE: With the Court's permission, the Government will call Lawrence Eugene Smith.

While Mr. Smith is coming in, Your Honor, I would ask that this item be marked as Government Exhibit Number Nine for identification.

THE DEPUTY CLERK: Government Exhibit Number Nine marked for identification.

[24] (Government Exhibit Number Nine was marked for identification.)

Whereupon,

LAWRENCE E. SMITH

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CLARKE:

Q. With the Court's permission, will you please state your name, sir.
A. Lawrence Eugene Smith.
Q. Where are you employed at the present time, Mr. Smith?
A. Buddies Tourist Home.
Q. You have to speak up.
A. Buddies Tourist Home.
Q. Going back, Mr. Smith, to September 24, 1971, a Friday, where were you employed on that day?
A. Buddies Tourist Home.
Q. What type of occupation, position, did you have at that time?
A. Sir?
Q. What did you do at Buddies?
A. Well, I was an all around man—clerk, painter—a little bit of everything.
[25] Q. Going back to that day, September 24, 1971, did you have an occasion to see anyone at Buddies that you now see today.
A. Yes, sir.
Q. Who is that, sir?
A. The young lady over there.
Q. Will you please point her out and tell us what she is wearing.
A. Over there.
Q. What is she wearing?
A. Today?
Q. Yes.
A. A brown dress.

MR. CLARKE: Your Honor, may the record reflect the witness has pointed and described the dress of the defendant.
THE COURT: It may.

BY MR. CLARKE:

Q. About what time was it in the day or night that you saw the defendant?
A. About four thirty.
Q. In the day or night?
A. Four thirty in the evening.
Q. Can you tell us under what circumstances you saw her?
[26] A. Her and a gentleman came in together.
Q. What did they do?
A. They registered the card for a room.
Q. They registered, is that correct?
A. Yes, sir, the gentleman registered a card.
Q. What did they do after they registered?
A. They went to the room.
Q. What room did they go to?
A. Room number two.
Q. Do you know how they got to that room?
A. I took them around to the room myself.
Q. Now, Mr. Smith, I would ask that you take a look in a second at an item.
THE COURT: I think you are going to have to shove that around so the defendant and her lawyer can see it.

BY MR. CLARKE:

Q. Mr. Smith, can you see that particular item from where you are?
A. Yes, sir.
Q. Let me move it back a little bit. Can you identify that, sir?
A. Yes, sir. That is the room number two right there.
Q. What is in room number two?
A. A sink, a dresser on one corner by the window, and then you have the bed. In relation to the bed you have [27] another, a table.

Q. Is there a bath room in that room?
A. No, sir.
Q. Where is the bath room?
A. The bath room is next door near the telephone booth.
Q. How do you get into the bath room?
A. You can come out of the room right into the bath room.
Q. Can you get to the bath room from the room itself?
A. No, you can't.
Q. In other words, you have to go outside?
A. Yes, you do.
Q. What type of locks do you have on the doors to the rooms?
A. It is not a spring lock. It's a heavy duty lock.
Q. It is one which closes automatically and locks automatically?
A. No, it don't. You have to lock it from the inside.

MR. CLARKE: At this time I would ask that this be marked as Government Exhibit Number Ten for identification. I will show it to the defense counsel.

THE DEPUTY CLERK: Government Exhibit Number Ten marked for identification.

(Government Exhibit Number Ten [28] was marked for identification.)

BY MR. CLARKE:

Q. Mr. Smith, going back to that time when they came in, will you please indicate exactly what took place when they came in to sign in the card.
A. They came in and signed. I spoke to them as they came in, I said "How are you all doing?" They signed the card.
Q. What did they sign the card as?
A. Mr. and Mrs.
Q. Was there any particular charge?
A. $4.00.
Q. How was that paid, do you know?
A. Four one dollar bills.

Q. Do you know where the man got the money?
A. From out of his pocket.
Q. Did you see if he had anything else at that time?
A. No, I didn't.
Q. What happened after the bill was paid?
A. I directed them to the room.
Q. This was room number 2?
A. Room number 2.
Q. At this time I would like to show you what has been marked as Government Exhibit Number Ten. Will you please take a look at that particular item.
[29] Q. Can you identify it, sir?
A. Yes. My initials are at the bottom of it. It is my handwriting.
Q. What do you identify it as?
A. Sir?
Q. What do you identify it as?
A. As a register card.
Q. What name is it in?
A. Mr. and Mrs. James Johnson.
Q. Is that the register card used by the individuals in this case, the defendant and the man with her?
A. Yes, sir.
Q. Mr. Smith, can you tell us what happened, if anything, after they went to the room? What time, first of all, does the card reflect that they rented that room?
A. Repeat that, please.
Q. What time does the card show?
A. 4:30.
Q. In the evening?
A. 4:30 p.m.
Q. Did anything happen later on?
A. I heard someone screaming later on.
Q. About how long after they went into the room, you showed them to the room, would you say it was?
A. About a quarter to five.
[30] Q. About fifteen minutes later?
A. About fifteen minutes later.
Q. Can you tell us where you were, who you were with, and what happened?

A. I was in room 14 with Mr. Henderson and Mr. Griffin at the time.

Q. Is that Mr. Thomas Henderson and Mr. Sherman Griffin?

A. Yes. I was sitting there talking for about fifteen minutes, we sat there for about that long, and then I heard a scream and I heard somebody holler "help" just like that.

Q. Were you able to tell whether it was a male or a female voice?

A. It was a female voice. You can distinguish the difference between a female voice, whether it was heavy or light.

Q. In your opinion, it was a female voice?

A. It was a female voice.

Q. Then what happened, sir?

A. I came to the center hallway which was on the 1320 side, and I came to the circle hallway and I told Mr. Henderson to come on, and we stood there to try to find the direction where it came from. And when we found out where it came from—

Q. Did you hear it again, sir?

A. Sir?

Q. Did you hear any more noise?

[31] A. Yes, sir. She was still hollering "help".

Q. This was the female voice?

A. A female voice.

Q. Then what happened?

A. We went around by the office where it was and, number 2, and me and Mr. Henderson, after we got there, I knocked on the door and I didn't get no reply. The only reply I got was "help". And we stood there for about ten seconds. I didn't get no reply, so I just kicked the door open.

Q. When you kicked the door, what if anything happened?

A. Sir?

Q. What happened when you kicked the door open?

A. When I kicked the door open, the gentleman was laying over the top of the lady trying to push a knife into her chest.

MR. CLARKE: Now, Mr. Smith, I would ask at this time that you come down here and take a look at Government Exhibit Number Nine for identification.

(Witness goes to the blackboard.)

MR. CLARKE: Now, standing over there, take the pointer and this microphone.

BY MR. CLARKE:

Q. Keeping this red pen available, will you please, first of all, just indicate where the doorway is into the room?

A. Right here.

[32] Q. Now, where were you when you first heard the scream, where abouts, in that drawing would you have been?

THE COURT: Hold the microphone.

THE WITNESS: You can't show it here. We have a center hallway. It is up here, coming back this way.

BY MR. CLARKE:

Q. About how many feet away would you say it is?

A. Fifteen feet.

Q. Now, once you broke down the door, where did you see the man and woman?

A. Right here. She was hanging over the bed.

Q. Now, you are indicating facing the bed it would be the right side of the bed near the wall?

A. Right here, yes sir.

Q. She was what?

A. She was hanging off the bed and he was on top of her with the knife.

Q. Was she on her stomach or on her back or side?

A. She was on her back with one leg hanging off the bed.

Q. Where was he?

A. Over the top of her trying to push the knife into her chest.

Q. Will you please take the red pen and just mark with an X on that diagram where it was you saw both of them.

[33] A. Right here.

Q. A little larger.
A. Yes.
Q. Now, what did you do when you saw this?
A. I went—
Q. Try to speak into the microphone.
A. I went in and I grabbed them. I grabbed the blade of the knife from him and I pulled him off the lady. We struggled all the way back to here where the police found that on the floor right there.
Q. Indicating on the floor area?
A. Yes.
Q. Mark that area with a little 1. Why don't we do it this way. Use a zero, because that will distinguish it.
A. Okay. After I got the knife out of his hand, which was lying on the floor at the time, I took the knife and put it on top of the telephone booth right here. Then I went into the telephone booth and called the operator and told her to connect me with the Rescue Squad and the Police Depatment.

MR. CLARKE: Mr. Smith, you can take the stand again.

(Witness resumes the stand.)

MR. CLARKE: At this time, Your Honor, I would ask that this item be marked as Government Exhibit Number Eleven for identification, number twelve and number thirteen.

[34] THE DEPUTY CLERK: Government Exhibit Numbers Eleven, Twelve, and Thirteen marked for identification.

(Government Exhibit Numbers Eleven, Twelve and Thirteen were marked for identification.)

BY MR. CLARKE:

Q. Mr. Smith, I would like to show you at this time what has been marked for identification as Government Exhibit Number Eleven. Will you please take a look at that.
A. Yes, sir.

Q. Can you identify that particular item?
A. Yes, sir.
Q. What do you identify it as?
A. This was the knife I took from the gentleman and put it on top of the telephone booth.
Q. At this time I would like to show you what has been marked for identification as Government Exhibit Number Twelve.
A. That belongs to it, too.
Q. Can you identify that?
A. Yes, sir.
Q. What is it?
A. It's a knife we have around the tourist home. We have a lot of them. We use them to cut up meat and stuff. We have a little kitchen back there.
Q. Do you know where that particular knife was [35] located?
A. It was on the top of the telephone booth.
Q. Was that there the time you placed that knife, Government Exhibit Eleven, on the telephone booth?
A. It was there at the time. They found it up there.
Q. I would like to show you now what has been marked as Government Exhibit Number Twelve. Can you identify that item?
A. Well, the police say they found it in the room.
Q. My question is can you identify that?
A. No, I can't identify it, sir.
Q. Did you see that on that day?
A. Later on when the police brought it out of the room.
Q. Did you see it on top of the telephone or any place?
A. No, sir.
Q. Now, Mr. Smith, when you first saw the individual who came with the man who was in the room, the defendant in this case, did you see what she was wearing?
A. Yes, sir; a blue blouse.
Q. Will you please describe what she was wearing at that time?
A. A blue blouse, a pair of dungarees and a pair of tennis shoes, blue and white stripes.

Q. What kind of shoes?
A. Tennis shoes.
[36] Q. Continue.
A. Blue with white stripes around them.
Q. When you went into the room and this woman was screaming, did you see what she was wearing at that time?
A. She had on panties and a bra.
Q. Did you see if she had any shoes on at that time?
A. No, sir.
Q. You didn't see or you don't know?
A. I didn't see.
Q. Now, can you describe what the man was wearing when he was inside the room when you broke in?
A. He didn't have no shirt on; he didn't have no shoes on. He had pants on.
Q. Just a pair of pants?
A. A pair of pants.
Q. Did you see if there was any blood or anything when you came into the room?
A. There was a lot of blood.
Q. Did you see any on the man?
A. All I seen was a lot of blood.
Q. Did you notice if the man himself had any blood on him?
A. No, I didn't.
Q. What about the woman?
A. No, I didn't pay no mind.
[37] Q. What happened to the woman after you got in and took the man off of her?
A. I came out and made a telephone call and called the police.
Q. Let me ask you this: When you came out to call the police, was she still in the room?
A. Yes, sir, at present.
Q. Excuse me?
A. At the present, I believe so, when I came out and put the knife on the telephone booth.
Q. What happened then?
A. At that time I heard the doorbell ring.

Q. When you say you heard the doorbell ring, exactly what do you mean?
A. In other words, we have two buzzers. One will ring when somebody is going out and it will ring if somebody wants to come in.
Q. They are different sounds?
A. Yes, they are different sounds.
Q. What sound did you hear then?
A. Somebody going out.
THE COURT: Going out where? What door?
THE WITNESS: Out the 1320 side.

BY MR. CLARKE:

Q. That is the same side this room was on?
[38] A. No, sir. This is up on the 1322 side.
THE COURT: I think you better explain that to the jury.

BY MR. CLARKE:

Q. How many entrances are there to or from this building.
A. We have two entrances, but we don't use one entrance.
Q. Where are the two entrances?
A. We got one on the 1322 side and one on the 1320 side.
Q. Which side do you use?
A. We use the 1320 side for entrance.
Q. Is that the side where you heard the buzzer ring?
A. That is the only one that has the buzzer.
MR. CLARKE: Now, Mr. Smith, I would ask at this time that you step down and come over to where I am. Now, at this time I would ask that you take Government Exhibit Number Eleven and stand over here so everyone can see.

(Witness goes to the blackboard.)

MR. CLARKE: Take Government Exhibit Number Eleven and use your hands as if you were the woman that you saw on the bed. How was she holding that knife, and use my hands as the man who was on top.

THE WITNESS: Well, I took the knife from the man's hands like this.

[39] (Indicating)

BY MR. CLARKE:

Q. Mr. Smith, will you please indicate exactly what you saw when you got to the bed, how did it appear to you at that time?

A. At the time? I don't understand.

Q. How did the hand appear to you.

A. Well, it appeared—

Q. Take this as the knife and please indicate how it was—you being the girl and myself being the man.

A. Well, it had to be—

Q. Not how it had to be. What you saw.

A. You are the man and I am the girl?

Q How is the knife pointing?

A. Pointing at the woman. She was trying to get back up this way and stop it coming into her chest.

Q. Now, where was the man on the woman? Was he directly over her?

A. Yes, he was over her.

Q. Now, directly, indicating this to be the bed, just like this, directly over her?

A. She was hanging off the bed, one leg off the bed, one leg on the bed.

Q. Where were his legs when he was over her?

A. He was on the bed.

[40] Q. Where were his legs? Pointing which way?

A. Just like this.

Q. Try to speak up loudly so we can hear.

A. Pointing back this way. His head would be this way at the head of the bed.

MR. CLARKE: You may take a seat again, sir.

(Witness resumes the stand.)

MR. CLARKE: I have no further questions, Your Honor.

CROSS EXAMINATION

BY MR. GASTON:

Q. Mr. Smith, when Miss Agurs and Mr. Sewell came into the tourist home, who was it that filled out that card that you identified before?

A. The gentleman.

Q. The gentleman did?

A. Yes, sir. They have to fill it out.

Q. He completed the whole form, did he not?

A. Yes, sir, except for the bottom part of it where I completed it with my initials and everything on the bottom.

Q. Now, when you went into the room after this incident occurred, was there any evidence of a struggle that might have occurred between the people who were in the room?

A. All I saw was a lot of blood.

THE COURT: Where did you see the blood?

[41] THE WITNESS: On the floor, the bed and the wall.

MR. GASTON: Will you come down here and tell the ladies and gentlemen of the jury the various areas where you saw blood.

(Witness goes to the blackboard.)

THE WITNESS: Here and here and all over the bed and along side of the wall here, and on this side of the wall.

MR. GASTON: Your Honor, could the witness take a pen or something and mark it so the record is clear.

THE WITNESS: On this side here, the wall here and the floor and on the bed.

(Indicating).

MR. GASTON: While you are here, Mr. Smith, can I get you to draw on this paper a floor plan of the first floor of the tourist home showing the location of this particular room in relation to the location where the sign-in desk is and the hallway that leads to it.

THE WITNESS: Here is the hallway coming down. Here is the office here. Here is room number 2, the bath room and the telephone.

MR. GASTON:

Q. Wait a minute. Try and do it a little more clearly so the ladies and the gentlemen of the jury can identify the rooms. In other words, make each room a square. What is that?

A. This is the 1322 side. Here is the hall.

[42] MR. GASTON: You have to speak up.

THE COURT: Let him draw it and then describe it for us. You draw it and then when you are through drawing, stand back and take the pointer and describe it to the jury.

MR. GASTON: Take your time.

THE WITNESS: This is the hall.

MR. GASTON:

Q. Where is the front door?

A. The front door is right here by room 14.

Q. Was that where they came in?

A. They came in through here.

Q. Where is the sign-in desk?

A. In the center hallway right here.

Q. How would they get from the front door to the desk?

A. They come in and come down this hallway, come in the front door right here.

Q. Draw a path, if you would, please.

A. (Witness indicates on diagram.)

Q. From the desk where did they go, where does the path go?

A. From here they come from the desk and into room number 2 right here.

Q. Now, you stated you were at the desk when they came in. Where were you when you heard the screams?

A. In room 14 here.

[43] Q. In room 14?

A. Right.

Q. Approximately how far here is room 14 from room 2?

A. About fifteen feet.

Q. What were you doing in room 14?

A. Sitting there talking.

Q. Can you recall approximately how many screams for help that you heard?

A. No, sir, I couldn't.

Q. Can you give an approximation? Was it five, ten, twenty?

A. It could have been five, it could have been ten.

Q. In the area of five or ten?

A. It could have been.

THE COURT: Are you through with him at the board?

MR. GASTON: Yes, I am. You can return.

THE COURT: Return to the stand again.

(Witness resumes the stand.)

MR. CLARKE: May that diagram be marked as defendant exhibit Number One.

THE COURT: Very well.

THE DEPUTY CLERK: Defendant Exhibit Number One marked for identification.

(Defendant Exhibit Number One was marked for identification.)

[44] BY MR. GASTON:

Q. Now, you identified a sheath that counsel for the Government showed you, a knife sheath.

THE COURT: That's not so.

THE WITNESS: Sir?

THE COURT: He withdraws the question. Do you want to rephrase the question. Did you hear his testimony, counsel?

MR. GASTON: All right.

BY MR. GASTON:

Q. There came a time you picked up the knife—correct?

A. Yes, sir.

Q. Did you ever see the container which held that knife?

A. No, sir.

Q. You never did?

A. No, sir.

THE COURT: You saw it after the police showed it to you, did you not?

THE WITNESS: After the police showed it to me, yes, sir; not before.

BY MR. GASTON:

Q. Did you see where the police got it from?

A. No, I didn't.

Q. Now, how long was your struggle with Mr. Sewell over [45] the knife?

A. I guess it took about ten or fifteen seconds.

Q. Was anyone else involved in that struggle with Mr. Sewell?

A. Mr. Griffin.

Q. Mr. Griffin?

A. And Mr. Henderson.

Q. Did he get involved in it, also?

A. Yes.

Q. So it took all three of you that length of time to get the knife from him?

A. Yes, sir.

Q. Did there come a time when Mrs. Sewell came to the tourist home?

A. She came there once.

Q. Did she talk at all about a knife that her husband may have had?

A. She told me that her husband would use a knife.

MR. GASTON: I have no other questions, Your Honor.

REDIRECT EXAMINATION

BY MR. CLARKE:

Q. Mr. Smith, when you say you were struggling for this knife, exactly what do you mean?

A. I had the knife—in other words, I had my hand on the knife because I cut my hand trying to take the knife from [46] him.

Q. What was he doing?

A. He was still clutching to the knife.

Q. Was he saying anything or doing anything?

A. He wasn't saying nothing. He just wouldn't turn the knife loose.

Q. How did you finally get it from his hands?

A. Mr. Griffin and I twisted it out of his hands. Then when I got it, I took it and put it on top of the telephone booth.

Q. When you were twisting it out of his hand, where was the defendant at that time?

A. I think she was still on the bed at the time. She never did come down. I didn't see her go out of the door, actually.

Q. Out which door?

A. Out the 1320 side.

Q. Did you see her go out of the room number 2?

A. No, sir.

MR. CLARKE: I have no further questions.

THE COURT: Did you ever hear a man's voice come out of that room at all?

THE WITNESS: No, sir.

THE COURT: So far as you know, he never uttered a sound?

[47] THE WITNESS: No, sir.

THE COURT: Any further questions?

MR. GASTON: No further questions, Your Honor.

THE COURT: All right. You may step down.

THE WITNESS: Thank you.

THE COURT: Do you wish to have the witness excused?

MR. CLARKE: Yes, Your Honor, I would ask that the witness be excused at this point.

MR. GASTON: I would like to have him remain on call, Your Honor, if I could. I may want to use him in my case.

THE COURT: Very well. You will be on telep' one call, Mr. Smith.

(Witness excused.)

THE COURT: Now, ladies and gentlemen, I know you would like to work longer today, but I think we are going to call it quits. We have to for several reasons—first of all, you are going to find out that it is a lot harder to sit and listen to somebody talk all day than you ever believed.

Second'y, we have other things that have to be done besides the trial of this case, and we have got to have some daylight hours to do it because we have personnel that have a right to a decent working day, as well as the judges need some time.

[48] So we are going to adjourn at 4:30. I would ask you to remember not to discuss any of this evidence among yourselves or with anyone else. Have a pleasant evening, and return at 9:30 tomorrow morning. You will reassemble in the jury room and, hopefully, we can start at 9:30 or a few minutes thereafter. I may have some preliminary matters in other cases that will delay us, but we can't predict with great precision.

But if you are ready and all of the other people are ready and everything falls into place, we should be able to proceed with this trial with some dispatch.

Another thing to remember during the course of the month: This is not a Ford assembly line where you have got buttons to push and everything falls in place. We are dealing with human beings. We are dealing with human beings, and we cannot run it like you would run some factory, and there may be five or ten minutes leeway and there may be times when you don't know what is happening, but there is nobody sleeping, believe me.

All right. Good night.

(Whereupon, at 4:30 p.m. the trial was adjourned to reconvene Thursday, July 6, 1972.)

[49]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 2081-71

UNITED STATES OF AMERICA

vs.

LINDA V. AGURS, DEFENDANT

Thursday, July 6, 1972
Washington, D.C.

Trial resumed before The Honorable AUBREY E. ROBINSON, JR., United States District Judge, and a jury.

APPEARANCES:

JOHN O'B. CLARKE, Esq.
Assistant United States Attorney
For the Government

ROBERT T. GASTON, Esq.
For the Defendant

[50]

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[51] PROCEEDINGS

(The trial resumed at 10:10 a.m., the defendant being present.)

THE DEPUTY CLERK: Linda V. Agurs, Criminal Action 2081-71.

THE COURT: Are you ready, counsel?

MR. CLARKE: Yes, Your Honor, the Government is ready.

MR. GASTON: Yes, Your Honor, the defense is ready. I have one matter which I would like to bring before the Court prior to bringing the jury out, if I may.

Yesterday in chambers, informally, I brought to the attention of the Court the matter which Mr. Clarke had brought to my attention yesterday involving a Brady question about two witnesses who neither he nor I have been able to locate who his police officer witness has indicated would testify that the decedent was accustomed to wearing the kind of knife involved here.

I have continued to try and contact those people and have been unsuccessful, and haven't heard anything contrary from Mr. Clarke and I assume he has been unsuccessful, also.

I also indicated in chambers that I didn't recall Mr. Clarke advising me of what these witnesses would testify to during discovery procedures earlier in the case. I have gone over my file and checked my notes on the conversations I had [52] with Mr. Clarke, and I could find no such indication in those notes.

Also, it was my impression that when Mr. Clarke told me yesterday about this matter, that it had come to his knowledge just from talking to a police officer, something of that nature. But, of course, I don't know about that.

But at any rate, as far as I know, and as far as my recollection serves me, this matter was first brought to my attention yesterday.

Other than that, there was some indication in the Grand Jury Minutes which I received on Friday that the brother, one of the witnesses I am discussing, might have been of some assistance, and it was then that I tried to reach him by phone.

Now, I have prepared, if Your Honor would go along with me, a subpoena for their appearance to come here forthwith. Frankly, I don't know how much good it would do in light of the fact that neither Mr. Clarke nor I have been able to reach them at their residence phone number. If I am unable to have them come here, I think that I would be entitled to have a stipulation from the Government that they would so testify, and I would ask that I receive that stipulation.

MR. CLARKE: Your Honor, the Government would object to that last part. I still don't know exactly what the facts are in this case. I do know I spoke to the brother and I did [53] not speak to the brother's wife, but I had personally spoken to the brother back in January or February of 1972. At that time the brother mentioned to me that his brother, the decedent in this case, did have and normally carried with him a hunting knife in a sheath.

However, first of all, I don't see what, really, what matter it makes in this case or what difference it makes in this case to whose knife that was. It was either the defendant's or the decedent's knife and it doesn't matter whose.

Secondly, I don't know if that is exactly what the brother would testify to if it did come down to trial.

Of course, there has been an insurance fight between himself and the decedent's wife as to who should receive in insurance in this case. I don't know where the truth lies, so I couldn't stipulate to the fact that that is what he would testify if he was called down and testified in this case.

I could stipulate that that is what he told me before. But, again, it comes down to the fact that I don't see the relevancy, really, or the materiality as to whose knife it was.

Now, as to whether or not I told Mr. Gaston about this, I would just like to mention for the record, Your Honor, that back in January and February of 1972, the defense counsel [54] and myself had an extensive discussion about this case.

At that time the defense counsel was the one who told me that the knife was the decedent's knife. Then I had my discussions with the witnesses, and I heard from the brother, that he said that was true.

So I told Mr. Gaston, I said: "Yes, what you told me seems to be the fact, that the knife was the decedent's knife."

I cannot say specifically I mentioned the brother as being the one who told me that. I believe I did, but I cannot say definitely that I did or did not.

MR. GASTON: May I be heard in response, Your Honor.

Mr. Clarke is accurate when he states that I told him that it was my information that it was the decedent's knife.

THE COURT: Where did you get the information?

MR. GASTON: The information was from double hearsay from the ultimate source which was the decedent's wife, who was now testified that she didn't say anything of the kind and that it was wrong, and it was when I presented the wife's potential testimony to Mr. Clarke yesterday in Mr. Clarke's office that he said that he later came back and told me that the police officer had said it wasn't the decedent's wife, it was the brother's wife, the brother's wife that made the comment.

[54-A] THE COURT: We are getting off on a collateral issue. I will issue the subpoena. If it is possible to serve it, very well. If not, it doesn't make any difference. It is not crucial as to whose knife it was.

MR. GASTON: Can I address myself to that point briefly. I think it is, Your Honor, because I think that what Mr. Clarke is trying to do in this case is set up sufficient circumstantial evidence to show that, in effect, Miss Agurs had this in mind all along. And if it is possible for him to argue—

THE COURT: Had what in mind?

MR. GASTON: Taking or leading this man into the tourist and then, in effect, rolling him.

THE COURT: That doesn't necessarily involve a knife.

MR. GASTON: Well, if he is able to argue that the knife is hers, it would lend support to his argument.

THE COURT: How can he argue that if there is no evidence as to it.

MR. GASTON: If there is no evidence to it, it seems to me that it is free for conjecture.

THE COURT: He can't argue anything that is not in evidence.

MR. CLARKE: Your Honor, I might also add—

THE COURT: He makes no proffer, and I have heard [55] no evidence so far that indicates that knife was in her possession at any time.

MR. GASTON: Fine, Your Honor.

THE COURT: Counsel are going to argue the evidence. I don't permit counsel to just speculate as to what might have been. What does the evidence show, what can be inferred from the evidence—that is all that he can argue.

MR. GASTON: All right, Your Honor.

THE COURT: Are these witnesses within the subpoena power of the Court?

MR. GASTON: They are in Wheaton, Maryland.

MR. CLARKE: Your Honor, I believe that is within the subpoena power of the Court. It is within—

THE COURT: Twenty-five miles.

MR. CLARKE: I believe it is 50 miles, Your Honor, for a District Court.

MR. GASTON: I think that is right, Your Honor.

THE COURT: Do you have an address that you have confirmed?

MR. GASTON: Yes, Your Honor, I obtained it from Mr. Clarke yesterday.

MR. CLARKE: Your Honor, this is the address that the witness gave me when I spoke to him. Also, the phone number that he gave me.

THE COURT: We will see if we can get the witness [56] here.

MR. GASTON: Thank you, Your Honor.

THE COURT: I will issue a subpoena.

Juror No. 9 has had death in her family, so she is not present. So we will have to seat the alternate.

MR. GASTON: All right.
THE COURT: Are we ready to proceed?
MR. CLARKE: Yes, Your Honor.
THE COURT: Have the jury come in, please.

(The jury enters the courtroom at 10:18 a.m.)

THE COURT: Now, ladies and gentlemen of the jury, unfortunately, Miss Jordan, Juror No. 9, has had death in her family. So we will have to ask Miss McCrae, Alternate No. 1, to take Juror No. 9's seat.

It has been brought to my attention that yesterday I might have created more confusion than anything else when I was talking about the stipulation and blythly told you with all of the confidence in the world that yesterday was the 6th of July. Today is the 6th of July. I guess I just got confused because we had a holiday, but today is the 6th of July, ladies and gentlemen. I can't even make it anything else if I tried.

I hope you were not confused by my error as I explained or tried to explain what a stipulation is all about.

All right. The Government is ready with its next witness.

[57] MR. CLARKE: Yes, Your Honor, with the Court's permission, the Government will call Mr. Thomas Henderson.

Whereupon,

THOMAS O. HENDERSON

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CLARKE:

Q. Now, Mr. Henderson, speaking up as loudly as you can and into the microphone, will you please state your name for the record.

A. My name is Thomas O. Henderson.

THE COURT: They all have to hear. Everyone of those jurors must hear you.

THE WITNESS: My name is Thomas O. Henderson.
THE COURT: Thank you.

BY MR. CLARKE:

Q. Where are you employed at the present time, Mr. Henderson, where do you work?

A. I work part time at the tourist home.

Q. Is that Buddies Tourist Home?

A. That's right.

Q. Going back to September 24, 1971, a Friday last year, do you know where you were working on that date, if you were working any place?

[58] A. At the Tourist home.

Q. Same place, Buddies Tourist Home?

A. Same place.

Q. Now, on that day, that Friday, September 24th, what were your duties, what did you have to do at the tourist home, what type of work did you do?

A. Buffing and mopping, cleaning up in the rooms.

Q. Do you know where Room No. 2 is at the tourist home?

A. I do.

Q. Where is that located? First, second, third floor?

A. On the first floor.

Q. Is it any where near the main hallway?

A. Down on the corner, about two steps down the hallway.

Q. Now, Mr. Henderson, on that day, again, Friday the 24th of September, did you have an occasion, or did you go in to clean up No. 2?

A. I did that morning.

Q. About what time would you say it was?

A. It was around about 11:00.

Q. When you say cleaning up, what do you mean? When you say that, what do you mean?

A. We go in and change the linen, take the old soap out, towels, change the bed, sweep the floor, and if it needs mopping, we mop it. If it needs waxing, we wax it.

[59] Q. Now, Mr. Henderson, after someone uses a room at the tourist home, do you have anything to do with that room? Do you do anything to the room after it is used?

A. Clean it up. We have a special man that changes the bed and takes care of the bed. But I do the cleaning of the rooms, the sink, the desk, trash.

Q. Now, is that done before anyone uses the room again?

A. Before anybody goes in.

Q. Now, going back to this day, the 24th of September, did you see anything unusual in the afternoon hours? Say, something around 4:30 to a quarter of 5:00, did anything unusual happen at the tourist home?

A. There did.

Q. Can you tell us about that.

A. It was between 4:30 and 5:00, we was down in Room 14, which is around the corner from No. 2. We heard somebody screaming and hollering, about three or four times she made a noise. The three of us ran around there.

Q. What?

A. The three of us ran around to No. 2.

Q. There were three of you?

A. Yes.

Q. Who were the other two?

A. Lawrence Smith, and the other fellow, I don't know his name.

[60] Q. Sherman Griffin?

A. Sherman, that's right, and myself. He knocked on the door.

Q. Who knocked on the door?

A. Lawrence Smith knocked on the door about twice. He couldn't get in. So he just taken his right foot and busted the door, he didn't bust it down but he knocked it off the hinges, off the catch. Then we all went in. I went in last. And there was the man and the woman was scuffling.

Q. All right. Now, Mr. Henderson, once the door was opened and you went inside, what did you see when you went inside?

A. They was scuffling over the knife.

Q. Let me sort of phrase it a little bit better. Was anyone in the room when you went in?

A. Just the two, the man and the lady.

Q. Where were they?

A. They was, oh, the position they was on the bed, she was about half-way across and he was on top of her scuffling with the knife. She was under him.

Q. Now, when you went inside the room, what did you do?

A. We tried to get him off the top of her, scuffled with him trying to take the knife.

Q. Now, how was the knife positioned? Do you [61] remember?

A. May I demonstrate it?

Q. First of all, did you see them with the knife?

A. I saw them with the knife.

MR. CLARKE: Will you step down here, and taking Government Exhibit No. 11, you be the man and I will be the woman.

(The witness leaves the stand.)

BY MR. CLARKE:

Q. First all, who had their hands on the handle of the knife?

A. The lady.

Q. Will you please place my hands—see, I will act as the lady so the jury can see—will you place my hands on the knife the way the lady had her hands.

A. (Indicating.)

Q. Where did the man have his hands on the knife?

A. Down around the blade (indicating).

Q. Now, who was laying on the bed?

A. She was.

Q. Try to speak up so we can all hear you.

A. The lady was.

Q. Where was the knife pointing, if anywhere?

A. Right down between them.

Q. Between them, is that correct?

[62] A. Yes.

MR. CLARKE: Will you take the stand again.

(Witness resumes the stand.)

BY MR. CLARKE:

Q. Now, Mr. Henderson, when you went into the room, how much of the woman could you see? Let's see, now, try to keep your voice up, sir.

A. I could see her feet and her head.

Q. Excuse me?

A. He was practically covering up her body. I saw her feet.

Q. As to her feet did you notice if she had anything on her feet?

A. She had some tennis shoes on.

Q. What?

A. A pair of tennis shoes.

Q. Tennis shoes?

A. Yes.

Q. What color were they?

A. My best knowledge, I think they was white. I am not sure, but I think they was white.

Q. What about her pants, did she have any dress or pants on?

A. She had on pants.

Q. Could you see any more of her besides that?

[63] A. No. That is all I could see.

Q. What about the man?

A. He didn't have no shirt on.

Q. Did you see if he had any shoes on?

A. I didn't notice because his feet was way down to the bottom of the bed. I didn't notice that.

Q. Did you notice if there was any blood in the room when you went in?

A. Sure.

Q. Where was the blood?

A. On the bed and on the floor.

Q. What part of the floor?

A. Right in the middle part as you go in the door there.

Q. What about the man himself, did you notice if he had any blood?

A. Sure, he had blood on him.

Q. Whereabouts?

A. On his pants and all up in here. I got blood on myself.

Q. You are indicating the front part of the body?

A. That's right.

Q. What about the girl?

A. I didn't see any blood on her.

Q. Now, what happened after you got in there, did you [64] start to help them, did you say?

A. I helped them.

Q. What happened then?

A. Well, we pulled him off her, what little part was on her, and they was still tussling with the knife, so Lawrence took possession of the knife. But I left then. I didn't see no more.

Q. When you left, what did you do?

A. I ran down the street to see if I could see a policeman to get help.

Q. Now, when you left the room, were they still inside?

A. They were still inside.

Q. Who is they?

A. Lawrence and the other fellow, I have forgotten his name, that was working there at the time.

Q. Now, Mr. Henderson, when an individual goes in for a room, are they given anything?

A. Sure.

Q. What are they given, sir?

A. They are given soap and a towel.

Q. After a person leaves the room, what happens to that soap and towel?

A. We take it out and throw it away. We don't use it any more.

MR. CLARKE: I have no further questions.

[65] CROSS-EXAMINATION

BY MR. GASTON:

Q. Mr. Henderson, when you first saw the knife, was the knife pointed toward the feet of the man and the woman, or was it pointed toward either one of the upper portions of the body?

A. Upper portion of the body.

Q. Whose body was it pointed toward?
A. It had to be the lady from what I saw.
Q. Who was on top? Were these two, one body on top of the other?
A. Not all the way on top. He was laying on the side there.
Q. One body was over the other body?
A. The man's body was over the woman's body.
Q. The man's body was over the woman's body. The knife was pointed toward the woman's body?
A. That's right.
Q. Now, you heard about, how many screams did you hear before breaking in the room? Do you recall?
A. I couldn't be exact, but I guess about three or four. I couldn't be perfect about it.
Q. Was that before you broke in the door?
A. Before.
Q. Were there any screams coming while the door was [66] being broken in?
A. No, there wasn't none then.
Q. How many times did Mr. Smith have to—how did Mr. Smith break down the door?
A. He kicked it with his right foot.
Q. How many times did he kick it? Do you remember?
A. About two.
THE COURT: Could you tell whether the screams were those of a male or a female?
THE WITNESS: Male or female?
THE COURT: Did it sound like a female to you?
THE WITNESS: Yes.

BY MR. GASTON:

Q. Now, you engaged in a struggle with the decedent over the knife.
THE COURT: Do you want to rephrase that.

BY MR. GASTON:

Q. When you went in the room, Mr. Henderson, what happened? I'm sorry. Let me ask you another question. Who went in the room first?
A. Lawrence.

Q. What did he do?
A. He broke the door and then he tried to take possession of the knife.
Q. From whom?
[67] A. From both of them. Both of them had possession of the knife.
Q. All right. What happened?
A. Well, they struggled over the knife, and it wasn't long before I left.
Q. Who was involved in the struggle at first?
THE COURT: Mr. Gaston, would you come to the bench.

(At the bench:)

THE COURT: Did you hear the direct examination?
MR. GASTON: Yes, Your Honor. But what I am trying to find out—
THE COURT: Cross-examination is cross-examination, not a repetition of direct examination. You can cross-examine him on the basis of any of his direct examination. You are just repeating the questions that the Government asked. Who kicked the door down—he told you on direct examination who kicked the door down. Who went in the room first—he told you who went in the room first.
MR. GASTON: May I ask him how long the struggle was?
THE COURT: Certainly. You can ask anything that is relevant to cross-examination. Cross-examination is not the repetition of direct examination. It is not direct examination all over again.
MR. GASTON: I was just trying to bring it out in [68] more detail.
THE COURT: All right.

(In open Court.)

BY MR. GASTON:

Q. Mr. Henderson, do you recall how long you were engaged in the struggle?

A. I couldn't say. It wasn't no more than about three or four minutes. Not that long. It wasn't that long. I couldn't be exact.

Q. When you left, was the struggle still going on?

A. Sure.

Q. Were you able to actually see Mr. Smith take the knife from the decedent?

A. I wasn't there. By the time he had taken the knife out, I left.

Q. You had left?

A. I had done left.

MR. GASTON: I have no other questions, Your Honor.

REDIRECT EXAMINATION

BY MR. CLARKE:

Q. Mr. Henderson, when you entered the room, did you notice if the man was completely over the woman, partially over, or how was he on top of the woman?

A. Partially. He was over like this way and she was back down that way.

[69] MR. CLARKE: Would you step down here again. Use this as the bed. This is the bed. This would be the wall.

(At this point the witness leaves the stand and comes down to the counsel table in front of the jury.)

BY MR. CLARKE:

Q. This would be the wall. Which side would the door be on?

A. This side.

Q. What side of the bed were they on?

A. On that side.

Q. Indicating the right side.

MR. CLARKE: Why don't you step over here. Now, I will be the woman. You place me on the bed the way she was.

(At this point Mr. Clarke and the witness both lay on the counsel table in front of the jury.)

MR. CLARKE: You get on the other side. Take the knife. You be the man.

BY MR. CLARKE:

Q. Did she have both her feet on the bed?

A. On the bed.

Q. Try to keep your voice up.

A. Both feet was on the bed.

Q. Keep your voice up.

A. He was laying in this position like this. Both of them was struggling with the knife.

[70] Q. Which way was the knife?

A. That way.

Q. Try to do it like it was, if you can.

A. Like this.

Q. Try to put your hand over here a little more so the jury can see.

A. In that position is the way they were struggling like when we entered the room.

(At this point Mr. Clarke and the witness complete the physical demonstration.)

MR. CLARKE: Thank you, Mr. Henderson. I have no further questions, Your Honor.

MR. GASTON: I have no questions, Your Honor.

THE COURT: All right. You may step down, Mr. Henderson.

MR. CLARKE: Your Honor, I would ask that the witness be excused at this point.

THE COURT: He may be excused.

(Witness excused.)

MR. CLARKE: With the Court's permission, the Government will call Lawrence R. Kennedy.

Whereupon,

LAWRENCE R. KENNEDY

was called as a witness and, having been first duly sworn, was examined and testified as follows:

[71] DIRECT EXAMINATION

BY MR. CLARKE:

Q. Will you please state your name, sir.

A. Yes, sir. My name is Officer Lawrence R. Kennedy, assigned to the First District, Metropolitan Police.

Q. What is your occupation, sir?

A. Police officer.

Q. Going back to September 24, 1971, what was your occupation on that date?

A. I was assigned to Scout 12 working the 3:00 to 11:00 tour of duty.

Q. 3:00 p.m. to 11:00 p.m.?

A. That's correct.

Q. Now, on that particular day did you have an occasion to respond to 1320 5th Street, N. W., in the District of Columbia?

A. Yes, sir, I did.

Q. If you can refrain from referring to your notes, it would be good.

Now, going on to that day, can you tell us approximately what time it was in the day or night that you responded to that location?

A. I received a radio run at approximately 4:55 p.m.

Q. Was that Buddies Tourist Home that you responded to?

A. That's right, sir.

[72] Q. Can you tell us what happened if anything when you arrived there, what you saw, what happened, and so forth?

A. Yes, sir. Upon being directed to Buddies Tourist Home located at 1322 5th Street, N. W., I went to Room No., I believe it was No. 2, and observed a Negro male lying face down naked from the waist up in a pool of blood, who was later identified as the decedent.

MR. CLARKE: Officer, at this time will you step down here, please.

(Witness goes to the blackboard.)

BY MR. CLARKE:

Q. Now, taking the microphone and looking at Government Exhibit No. 9, I believe it is, 9 for identification, can you indicate first of all whether or not you can identify that particular item?

A. The map?

Q. Yes.

A. Yes, this appears to be a diagram of Room No. 2 at 1322 5th Street, N. W., Buddies Tourist Home.

Q. Where would it have been that you noticed the man lying on the floor face down?

A. Right here where the blue X is.

Q. Now, there are two blue X's on that particular diagram. Just for the record, will you indicate whether it is the blue X on the bed or the blue X there—which blue X it is?

[73] A. It's the blue X on the floor with the red circle by it, between the bed and the hallway door.

MR. CLARKE: You may take the stand, again, sir.

(Witness resumes the stand.)

BY MR. CLARKE:

Q. Now, Officer, when you arrived at that room, what if anything did you do?

A. At first, my first intention was to preserve the crime scene. I had to remove two gentlemen who were standing in the doorway from out of the room and to prevent anybody further from coming in.

Q. When you say "preserve the crime scene," can you be a little bit more detailed about that? What actually do you mean?

A. Well, I guess it would be to seal off the room from any other person that is unauthorized to be in there, to keep them out and to remove anybody that was in there at the present time, to get them out, also.

Q. Where were the two individuals that you saw near or in the room when you arrived there?

A. They were standing in the doorway.

Q. Whereabouts in the doorway? Can you indicate from where you are.

A. Where the hallway is marked, they were standing between, they were standing actually into the doorway; they [74] weren't inside the room itself. They weren't outside in the hallway. They were in between.

Q. Now, Officer, after you preserved the scene, did anyone else arrive on the scene?

A. Yes, sir, they did.

Q. Who came?

A. Sergeant Quantrille, a First District Detective, and the Mobile Crime Lab.

Q. Now, before any of these individuals arrived, did you notice if anything was done with the man who was lying on the floor face down?

A. Yes, sir. He was removed by the ambulance aid men who were on the scene when I arrived.

Q. Do you know where he was taken?

A. He was taken to Freedmen's Hospital on 7th Street.

Q. Now, Officer, after the additional police officers you have indicated arrived on the scene, did you have an occasion to recover any particular items?

A. Yes, sir, I did.

Q. Will you tell us about that.

A. Yes, sir. A Mr. Lawrence Smith, who was the desk attendant—

Q. Try to stay away from what someone told you, if you can. Do you remember recovering anything picking up any items?

[75] A. Yes.

Q. What items were they?

A. They were two knives, and I am not really sure of this, and a sheath.

Q. At this time I would like to show you what has been marked for identification as Government Exhibit No. 11. I would ask that you look at this item.

Can you identify it?

A. Yes, sir. This is one of the knives I removed from the top of the telephone booth in the hallway.

Q. Is that the telephone booth that is right near the bathroom?

A. Yes, sir.

Q. Was there anything else up there when you took a knife off?

A. Yes.

Q. What else?

A. A small paring knife, steak knife type.

Q. At this time I would like to show you what has been marked for identification as Government Exhibit No. 12. Can you identify that?

A. Yes, sir.

Q. What do you identify it as?

A. This is the knife, one of the knives I removed from the top of the telephone booth.

[76] Q. Now, you have indicated something about a sheath. Can you tell us what you remember about that?

A. I don't remember the sheath specifically being removed from the top of the telephone booth. I really don't know where that was recovered. I can't remember if I myself handled it.

Q. At this time I would like to show you Government Exhibit No. 13 for identification. I will ask you, basically, this: do you remember seeing that particular item before?

A. Yes, sir.

Q. That is the item that you said you don't know where it came from?

A. Yes, sir.

MR. CLARKE: You don't remember. May I have the Court's indulgence for a second.

I have no further questions, Your Honor.

MR. GASTON: I have just one question.

CROSS-EXAMINATION

BY MR. GASTON:

Q. I wasn't clear on the time you arrived at the scene.

A. Approximately 4:55.

MR. GASTON: Thank you. I have no further questions, Your Honor.

MR. CLARKE: Your Honor, may the officer be excused [77] at this point?

THE COURT: Yes.

(Witness excused.)

MR. CLARKE: Your Honor, may counsel approach the bench?

THE COURT: Surely.

(At the bench:)

MR. CLARKE: Your Honor, may I have the Court's permission to go out and check in the hallway, check in the witness room to see which witnesses I have available at the present time. I am expecting Dr. Brownleee at 11:00. I don't know if he is a little early.

I also have a couple of other witnesses that will be here right around 11:00 to 11:15, and I could put one of them on if Dr. Brownlee is not here at the present time.

THE COURT: Yes.

(In open Court.)

(Short pause.)

MR. CLARKE: Your Honor, the Government now calls Detective Joseph Quantrille.

Whereupon,

JOSEPH C. QUANTRILLE

was called as a witness and, having been first duly sworn was examined and testified as follows:

[78] DIRECT EXAMINATION

BY MR. CLARKE:

Q. Will you please state your name, sir.
A. Joseph C. Quantrille.
Q. What is your occupation?
A. I am employed by the Metropolitan Police Department.
Q. In what capacity?
A. As a detective.

Q. For what section?
A. First District.
Q. Now, Detective Quantrille, going back to September 24, 1971, what was your occupation and assignment on that day?
A. I was assigned to the First District Detective Cruiser. I believe it was 717.
Q. Going back again, to that day, September 24, did you have an occasion to respond to a location known as Buddies Tourist Home?
A. Yes, sir, I did.
Q. About what time of the day or night do you remember first arriving there?
A. I believe it was right after 5:00.
Q. Did you have an occasion to leave Buddies Tourist Home at any time after you arrived there in relation to the case that you went there and go some place else?
A. Yes, sir, I responded to Freedmen's Hospital.
[79] Q. Try to keep your voice up. Where did you respond?
A. To Freedmen's Hospital.
Q. About what time was that?
A. I believe it was around 5:30.
Q. Can you tell us what if anything you did when you got to Freedmen't Hospital?
A. I went to Freedmen's Hospital to see how badly the complainant was hurt. I recovered some property while I was there.
Q. Can you tell us about recovering property. First of all, what is the standard operational procedure, if you want to use that word, as far as recovery of property from a hospital? What do you do?
A. Well, they take the property from him when he is admitted. And if it is a serious case, then we recover the property at that time.
Q. Will you describe in a little more detail what you mean by the property—you recover the property and they take it from him.
A. Well, he was being operated on, so they take what he was wearing off and give it to the head nurse. As I

remember, at that time we wanted to see if he had anything of value to safeguard, and things like that.

Q. What did you do when you got to the hospital about this property?

[80] A. Well, we recovered what property that they had. And we were told that this was all he had. We recovered a pair of pants and a knife.

Q. At this time I would like to show you what has been marked for identification as Government Exhibit No. 3, and I would ask that you look at that item.

MR. CLARKE: In the meantime, Your Honor, I would ask that this be marked as Government Exhibit No. 14 for identification.

THE DEPUTY CLERK: Government Exhibit No. 14 marked for identification.

(Government Exhibit No. 14 was marked for identification.)

MR. CLARKE: I will show it to defense counsel.

BY MR. CLARKE:

Q. Officer, going to Government Exhibit No. 3 which you have before you, for identification, can you identify that particular item?

A. Yes, sir. They are the pants that were recovered from Freedmen's Hospital.

Q. Now, when you recovered these pants, what if anything did you do with the pants?

A. I put them in, they were in a green bag, a green trash bag, a plastic bag. So I checked the pockets and found the knife in one of the pockets.

[81] Q. Did you find anything else in the pockets besides the knife?

A. No, sir.

Q. At this time I would like to show you what has been marked for identification as Government Exhibit No. 14.

Can you identify that particular item?

A. Yes, sir. I believe this is the knife I took from the pocket. I didn't mark it with my initials or anything, but I believe that is the knife.

Q. Now, what did you do with the knife and the pants after you recovered them from the hospital?

A. I responded back to the scene of the crime and turned them over to the Mobile Crime Lab.

Q. Would that be Officer Laughery of the Mobile Crime Section?

A. I believe so, sir.

Q. Officer, did you find any money in the pockets of those pants, Government Exhibit No. 3?

A. No, sir.

MR. CLARKE: I have no further questions.

CROSS-EXAMINATION

BY MR. GASTON:

Q. Officer, you state you didn't mark that particular knife.

A. No, I didn't.

[82] A. No, I didn't.

Q. In the usual course of your business don't you mark articles recovered?

A. Yes, sir.

Q. As a matter of fact, Officer, you have no way of knowing whether that is actually the knife that came from that pants pocket or not, do you?

A. It looks like the knife.

Q. It looks like the knife. But you can't be positive it is, can you?

A. No, sir.

MR. GASTON: No other questions, Your Honor.

REDIRECT EXAMINATION

BY MR. CLARKE:

Q. How many knives that look like that did you give to Officer Laughery?

A. Just one.

MR. CLARKE: I have no further questions.

MR. GASTON: No questions, Your Honor.

MR. CLARKE: Your Honor, may the officer be excused?

THE COURT: Yes, you may be excused.

(Witness excused.)

MR CLARKE: Your Honor, may counsel approach the bench again.

[83] THE COURT: Very well.

(At the bench:)

THE COURT: You want to look for witnesses? We will take a short recess. How many more do you have?

MR. CLARKE: Officer Laughery, Dr. Brownlee, and then I have one downstairs in the cell block, Mr. Griffin. That will be it.

MR. GASTON: Are you going to have Officer Horstkamp here?

MR. CLARKE: No I know where he is. I just have him on call.

(In open Court.)

THE COURT: The next witness to testify, ladies and gentlemen, is the Deputy Medical Examiner of the District of Columbia. He was instructed to be here at 11:00. So we are going to take a short recess and he should be here. We will take a short recess.

(Short recess taken.)

THE COURT: Are we ready to proceed?

MR. CLARKE: Your Honor, the Government is ready.

MR GASTON: Your Honor, before he brings the jury out, may I bring another matter before the Court.

Your Honor, another witness in this case that I learned that the Government intends to call is Sherman Griffin, who was also an employee at the tourist home. I sometime in [84] the past—and if I had time to check my file, I could give you the exact date—I tried to contact Mr. Griffin and learned that the phone number which I phoned, he no longer lived at, and I was told he had moved out of the city. I understand the Government has him available.

I asked Mr. Clarke if I could speak with him, and Mr. Clarke said only in Mr. Clarke's presence.

I think, Your Honor, that I have a right to talk to a witness, who legally doesn't belong to either side, without the strictures of Government counsel being present. And I would ask that I be allowed to speak to Mr. Griffin alone.

MR. CLARKE: Your Honor, Mr. Griffin has been in jail since, I believe, January 1972. He is presently in the lockup behind the courtroom at the present time. He is now in the minimum security section of Occoquan and has been sent up here pursuant to a come-up from the United States Attorney's office.

The reason that I requested that counsel not talk to Mr. Griffin unless I be present with him is that there has been some problem running through, actually, two of our witnesses so far, Mr. Lawrence Smith and Mr. Henderson. Mr. Smith told me a completely different story from what he testified to at the trial, basically as to the way the knife was held and such things as that.

[85] I have already spoken to Mr. Griffin back in, I believe it was February. The police officer has spoken to him today. I just ask that basically so that I don't learn anything by surprise from the witness stand, that I be allowed to be there, too, when counsel talks to him.

I do not consider this to be in any way infringing upon counsel's ability to prepare his defense. Just as when I talk to the witness, counsel being there would not hinder that in any way, so I do not see how my being there would hinder counsel.

MR. GASTON: For one thing, I don't know how those witnesses have—now, Mr. Clarke hasn't actually claimed surprise, but all of the prior statements obtained by the police seem to be in substantial corroboration with what testimony we have heard here today.

MR. CLARKE: Your Honor, the basic difference is in two matters—whether or not they have seen this individual before. Both Mr. Smith and Mr. Henderson have told me at prior occasions that they saw the defendant in the tourist home on several different occasions in the same

type of situation, as a Mr. and Mrs., with other individuals.

This would go to the inference that on this particular occasion she was there in an act of prostitution.

The witnesses both deny that particular episode prior to the time they testified. So I did not ask them on the [86] stand.

Also, Mr. Smith changed on several matters. One is the amount of money that was paid. One time he told me that it was, in the statement it was four singles. Then another time he told me he was given a $10 bill and he gave $6 change.

But the main way he changed was to the positioning of the knife. Before, he had told me that the defendant's hands were up at the top and the other individual's hands were down on the blade of the knife. And then at the trial he changed that.

Mr. Henderson yesterday two times demonstrated that the hands were as he demonstrated in Court. And then this morning his demonstration was different until we spoke to him again, and then he, you know, said yes, he was mistaken and changed the demonstration.

THE COURT: I guess what you are going to have to do when you interview them is interview them with a tape recorder and then take a signed statement and swear them to the statement. Then when they change, indict them for perjury. That is what you are going to have to do with them.

The witness is available to you. He is available to you. You can talk with him. Mr. Clarke doesn't have to be present.

MR. GASTON: Thank you, Your Honor.

THE COURT: And Mr. Clarke will have an opportunity, [87] before he testifies, he will have an opportunity to read the perjury statute to the witness.

MR. CLARKE: Yes, Your Honor.

MR. GASTON: Yes, Your Honor.

THE COURT: Read the perjury statute to them. All we have to do is lock up some of these liars. Then it will stop.

MR. GASTON: I guess it is neither here nor there, but I can see how some of the discrepancies occur just from memory.

THE COURT: No, no. Don't be so naive, counsel. Don't be so naive. They lie with impunity, with absolute impunity. You can try this case every week for the next 52 weeks and get a different version out of it. That's this Court's experience with some of these witnesses.

You may speak with him, certainly.

MR. GASTON: Thank you, Your Honor.

MR. CLARKE: Your Honor, the Government is ready to proceed. Dr. Brownlee is here.

THE COURT: All right. Call the jury in.

MR. CLARKE: Your Honor, while the jury is coming in, may this be marked as Government Exhibit No. 15 for identification.

THE DEPUTY CLERK: Government Exhibit No. 15 marked for identification.

[88] (Government Exhibit No. 15 was marked for identification.)

(The jury enters the courtroom.)

MR. CLARKE: Before the doctor testifies, may I announce to the jury a stipulation entered into between counsel.

THE COURT: Very well.

MR. CLARKE: Your Honor, the stipulation is as follows: It is agreed between the defense and the Government that if called to testify, Mrs. Edna G. Strong would testify that she is the Director of the Medical Records Department, Freedmen's Hospital in the District of Columbia. And that as such, as part of her position, she has care, custody and control and access to the records kept in the normal and routine course of business pertaining to the patients which are treated or admitted at the hospital.

She would testify that Government Exhibit No. 15 for identification is a true and accurate copy of the records pertaining to James Sewell from December 14, 1971, at Freedmen's Hospital, the medical records pertaining to

that individual. And that she has care, custody and control and access over those records, Government Exhibit No. 15, and they are kept and made in the normal and routine course of business.

THE COURT: Is that acceptable, Mr. Gaston?

MR. GASTON: That is correct, Your Honor.

[89] MR. CLARKE: Your Honor, at this time the Government would ask that Government Exhibit No. 15 be received in evidence.

THE COURT: Any objection?

MR. GASTON: No objection.

THE COURT: All right. It will be received.

(Government Exhibit No. 15 was received in evidence.)

MR. CLARKE: The Government will call Dr. Brownlee.

Whereupon,

WILLIAM J. BROWNLEE, M. D.

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CLARKE:

Q. Will you state your name, sir.

A. Yes. Dr. William James Brownlee.

Q. Dr. Brownlee, what is your occupation at the present time?

A. I am a doctor of medicine and I am a Deputy Medical Examiner for the District of Columbia.

Q. Dr. Brownlee, would you please explain to the Court and the ladies and gentlemen of the jury what your experience has been.

A. Yes. I have a Bachelor of Science degree in [90] chemistry and a Doctorate of Medicine.

Subsequent to that I interned for one year at Freedmen's Hospital. I have had four years of surgical training in a Howard University affiliated hospital, culminating in certification by the American Board of Surgery.

Following that I was a Medical Officer and Chief Medical Officer at the District of Columbia General Hospital. In 1966, I transferred from the D. C. General Hospital to the then Coroner's Office of the District of Columbia, which has had its named changed as of February 1, 1971, to the Medical Examiner's office of the District of Columbia.

I have been there since that time.

Q. Doctor, as part of your functions as a deputy coroner and deputy medical examiner, do you ever do what is known as an autopsy?

A. I do.

Q. Will you please explain basically what that is and then what type of experience you have had in autopsies?

A. Yes. In an autopsy—

THE COURT: You are going to have to keep your voice up a little.

THE WITNESS: All right, sir.

A. (continuing) an autopsy is a procedure that is performed by doctors in the medical examiner's office on a person who has died, regardless of the type of death. It's an [91] examination of the body after death. This involves quite, without going into a lot of technical aspects, it involves several phases.

One is an external examination, where the body is examined on the outside and, also, the body is examined on the inside.

In addition to these, we do certain studies, microscopic studies, where sections of tissue are taken and slides are made of them. And we do certain chemical studies where we may take body fluids or tissues and run them for chemical analyses.

BY MR. CLARKE:

Q. Doctor, can you give us the purpose or the reason an autopsy is performed on an individual?

A. Our office is obliged by the Government of the District of Columbia, it's our obligation to examine people

who have died in the jurisdiction of the District of Columbia, to ascertain why they died.

Now, in effect, our office has the charge of insuring a person the right to die, whether he died of a natural death or whether he dies as a result of suicide, or overdose, if he is killed, did he die of drowning, did he have a heart attack—just why did he die. That is our job.

Q. Doctor, since 1966 how many autopsies have you performed, or could you estimate?

[92] A. I would say on an average I do about 400 per year.

MR. CLARKE: Your Honor, the Government would submit that Dr. Brownlee is qualified to testify as to the cause of death and autopsies.

MR. GASTON: No objection, Your Honor.

THE COURT: Very well.

BY MR. CLARKE:

Q. Dr. Brownlee, going back to September 24, September 25, 1971, did you have an occasion on either of those two days to review the remains of an individual by the name of James T. Sewell?

A. I did.

Q. At this time, Doctor, I would show you Government Exhibit No. 15 which is in evidence, which are medical records of Freedmen's Hospital pertaining to Mr. Sewell from the 24th of September, 1971. Have you had an occasion to review those particular records?

A. I have.

Q. Now, Doctor, on what day was it in September 1971 that you did perform or review the remains of Mr. Sewell?

A. The autopsy was performed on the 25th of September 1971.

Q. Can you tell us, Doctor, what findings, if any, you had in that particular case? What you did and what you observed?

[93] A. Yes. In a general description of the decedent, he was identified as being 27 years of age. He is a Negro male. He weighed approximately 150 pounds, and he was five-feet-nine-inches in height. He was very well developed and well nourished, and he had a number of wounds on his body some of which were surgical wounds, that is, created by surgeons in a hospital, and some were wounds that were inflicted prior to the surgeon's wounds.

Most of the wounds were located in the trunk of the body, that is, involving say, between the neck and the legs. There were several stab wounds and there were several cuts on the body.

I think it's best that I probably go through them and then place them for you. I am only going to list the wounds that were inflicted, not the wounds inflicted by the surgeons.

There was a wound that was in the front of the chest near the breastplate near the neck just to the right of the mid-line. This was a stab wound of his chest.

Q. Doctor, if I may interrupt you for a second, can you please tell us the difference between what you have described as a stab wound and a cut?

A. Yes. A cut and a stab wound are both incised. These wounds, meaning by that that they were inflicted by a sharp instrument. We differentiate between a stab wound and a [94] cut mainly in the direction of the inflicting object. A stab wound, a point is going into the body. And in a cut, the sharp edge of it is laying tangenital to the skin, so that one cuts in this manner and stabs in this manner (indicating.)

Q. Now, Doctor, could you continue with your description of the wounds in the chest area.

A. The wound that I have just mentioned, that is, one near the breastplate and just to the right in the front of the chest, measure three-fourths of an inch in width. There were what we call abrasive wounds, three abrasive wounds on the left side of the chest.

Now, an abrasive wound is one that is created mainly by friction, as one would notice if you rub your arm or hand or knee, say, on gravel and you notice a scraping effect. That is what we call an abrasion. We had three of those wounds. These do not go into the body. In fact, they don't go through the skin. They were on the left side of the chest.

On the right side of the chest in the front near the lower part of the rib cage was a three-inch cut or laceration.

On the opposite side, the left side of the chest, there are two wounds. One is four inches in length and the other is one-half inch in length.

Now, the four inch wound is a cut wound or laceration. The one-half inch wound was a stab wound.

So at this point we have two stab wounds—one in [95] this position and the other in this position. That is, one in the upper right side of the front of the chest and one on the left lower side of the chest (indicating.) On the abdomen or the area overlying the stomach just above the navel is a one-half inch stab wound. That is, if you take the point of your navel and go up about an inch and a half above it, you have a one and a half inch stab wound. So now we have a total of three stab wounds to the body.

As one goes to the left side of the abdomen near the navel we find another one and a half inch wound. These are all of the major stab wounds on the front of the body.

On the back we have a three-inch gaping wound, that is, a wound opening up and quite deep which is in the region of the lower back or what we call the lumbar area. It's on the right side. It's transverse. If the person were standing, it would be parallel to the floor.

And on the upper portion of his back near his neck there is a six-inch wound which goes into the skin but doesn't go through it.

Now, on his arms and hands, on the right forearm there is a two-inch cut that courses through the dermis and into the sub-cutaneous tissue. This is a fatty tissue beneath the skin. It does not go into the muscle of the arm, just through the skin and into the fatty area.

On the left hand, the third and fifth fingers on [96] the palm side are cut.

Now, in addition to the wounds that I have given you thus far, there were two significant surgical incisions. One is a hockey stick incision that courses from his right shoulder down and parallels his collar bone and comes down across his breastplate. And the other is a long mid-

line incision of the abdomen. These were created by surgeons at the hospital.

Now, if one goes into taking the stab wounds and the wounds inflicted on the outer surface and projecting what was found on the inside—

Q. Doctor, if I may interrupt you a second before you go into the internal examination, can you go back a second to the wounds you noticed on the arms and hands.

A. Yes.

Q. In your experience as a coroner, deputy coroner and medical examiner, have you noticed wounds similar to that before?

A. Yes, we have.

Q. Is there any particular pattern that these wounds take?

A. Most wounds that occur either on the surface ???? (illegible!!!!!!)

[97] You can understand if somebody comes with a knife, your natural instinct is to ward that inflicting object away from you and frequently you will get cut in the areas that I mentioned, the dorsal surface of the hand or in the palm of the hand.

Q. And are the wounds that you noticed on the arms and the palms of the hand consistent with that?

A. Yes, they are.

Q. Doctor, are there also any wounds in the hands that would have been consistent with someone holding a knife, the blade of a knife?

A. Well, the wounds that cross the fingers, there is a possibility that those fingers held the knife. I can't say exactly. The only thing I can tell you is that you have sharply incised wounds in these areas.

Now, to project as to whether or not a knife was held, whether it was cut, I couldn't tell you. They inflict the same wound.

Q. Let me ask you this: would they be consistent with an individual holding a knife?

A. That's possible, yes.

Q. Would you continue with your internal stab wounds.

A. The wounds that entered the upper right chest just to the right of the breastplate, the sternum, coursed into the heart. It went through two chambers of the heart and it [98] crossed one of the main valves of the heart. This wound, when I examined it, of course, had been closed by the surgeons. This was the reason for the hockey stick incision, because they had gone in to repair the heart.

The wound that entered just above the navel went into the liver and penetrated for a depth of approximately five and a half inches from the skin surface.

Q. Doctor, can you estimate or did you measure how far in the wound that went into the heart penetrated?

A. The estimated depth of that wound from skin surface to the tricuspid valve would be approximately three and a half to four inches.

Q. Thank you.

A. The wound that entered, the stab wound that entered the left side of the chest just above the left lower rib cage, the boarder of it, entered the chest, it entered the diaphragm. The diaphragm is a layer of muscle tissue that separates the two main cavities in the body, the abdominal cavity from the thoracic or chest cavity, and this wound entered the left chest, coursed in through the diaphragm and then went into the stomach.

The stab wound in the lower right-chest that we mentioned before went through the muscle between the ribs, between the seventh and eighth rib, and also entered the diaphragm and cut the right lobe of the liver.

Now, the essential features from the interior [99] examination, and joining them with the findings of the external examination, without going into a lot of medical terminology, we came with a conclusion as to the cause of death, that the decedent died of shock which was secondary to or due to a massive bleeding from these various wounds which were due to the multiple wounds, and the principal wound being that of the heart.

Q. Doctor, at this time I wou'd like to show you what has been marked as Government Exhibit No. 11. Now, looking at that particular instrument, do you know whether or not, first of all, as to the cut wounds on the

individual's body, if that would be consistent, if the wounds would be consistent with a weapon like that?

A. It's very possible, yes.

Q. What about the stab wounds?

A. It's possible, also.

Q. Now, Doctor, if you notice, the width of that is slightly more than a half-inch. Would that still be consistent with the size of the opening on those stab wounds?

A. Do you mean can a half-inch measured stab wound on the skin surface be created by an instrument greater than one-half inch? The answer is yes.

Q. Can you please explain that.

A. The skin has elastic tissue in it. It has the capability of giving and retracting, giving and retracting. [100] One can, therefore, penetrate the skin in, say, a taut situation, or even if it is not taut, and create a wound that when the inflicting instrument is removed, the skin just contracts and you measure the distance of the skin at that particular point and it is less than what the wound is, than what the instrument is. So it's very possible that you may get a three-quarter or one inch instrument creating a half-inch wound.

MR. CLARKE: Doctor, at this time I am going to ask that you become an artist, in a sense, and if you could, step down over to this blackboard where we have a blank piece of paper, and I will give you a pen and ask if you just mark basically sort of the figure of a human being and whereabouts on the figure the wounds would have been.

(Witness goes to the blackboard.)

MR. CLARKE: Will you take this microphone and any number of pens that you wish.

Your Honor, after the doctor has marked that, I would ask that that be marked as Government Exhibit No. 16 for identification.

(Government Exhibit No. 16 was marked for identification.)

MR. CLARKE: Doctor, could you just mark above the top of that whether that is a front or a back view. I imagine it is a front view.

[101] Doctor, could you just take the pen, the blue pen, I guess, would be the easiest way to do it, and just encircle those wounds which were stab wounds as compared to cut wounds.

THE WITNESS: You don't want the incisions, do you?

MR. CLARKE: Do you mean the surgical incisions?

THE WITNESS: Yes.

MR. CLARKE: No, we don't need that.

(Witness resumes the stand.)

BY MR. CLARKE:

Q. Doctor, do you know if it is normal procedure for the Coroner's Office to have tests performed on the blood of an individual as to ethyl alcohol content?

A. Yes, we do.

Q. Was that done in this particular case?

A. Yes, it was.

Q. Is it standard procedure to make a report of that? Do you keep those on file with the Coroner's Office?

A. That's correct.

Q. What are the results in this particular case?

A. That the decedent had a blood alcohol level of 0.12 percent.

Q. Do you know what is the legal percentage for intoxication in the District?

A. It is considered 0.15 percent.

[102] Q. And this would be below that, is that correct?

A. That's correct.

MR. CLARKE: I have no further questions, Your Honor.

CROSS-EXAMINATION

BY MR. GASTON:

Q. Doctor, as to the alcohol content of the blood, do you know at what time of day the blood was examined for that purpose?

A. I don't know what time of day it was done. I know what time I took it.

Q. Excuse me?

A. I know what time I took it, but I don't know what time of day the actual examination was performed.

Q. Do you know what time you took the blood?

A. Yes.

Q. To perform the examination?

A. Yes.

Q. When was that?

A. That was done in the morning, about 11:00, on September 25, 1971.

Q. Does the hospital record, Government Exhibit No. 15, indicate anything about transfusions being given to the decedent?

A. The portion of the records that I have does not [103] reflect evidence of a transfusion. I have the doctor's progress notes and the operative report, and the emergency care report. That is the emergency room record.

Q. So you are unable to say from those reports whether there was a transfusion or not?

A. No; these records do not state whether there was or was not.

Q. All right.

A. One could presume that there was.

Q. Presume that there were transfusions?

A. Yes, surely.

Q. If there were transfusions, this would certainly diminish the percentage of alcohol content of the blood, would it not?

A. It would.

Q. Also, Doctor, isn't it true that—what was the time of death according to the records?

A. The pronouncement time was 10:30 p.m. on September 24, 1971.

Q. All right. Assuming that the alcohol was consumed prior to 4:30 p.m. on that date, isn't it also safe to say that the natural purification system of the body would diminish the percentage of alcohol in the blood at the time of death, or by the time of death?

A. You have to take into consideration that you don't [104] have a natural phenomenon occurring here. This man from his hospital records was in a state of shock for a considerable period of that time, so he doesn't have the

normal filtration system or detoxification system of alcohol system working for him.

Q. Would the system be completely shut off or would it be working to a certain extent?

A. Probably to a lesser extent, but quite a marked lesser extent.

Q. Now, Doctor, you have called, or have characterized the wounds on the hands of the decedent as being defensive. Now, is it not perfectly possible for someone to receive defensive wounds while engaged in an offensive attack?

A. I think you have to define what is defensive and what is offensive.

Q. Excuse me?

A. I think what you are looking for is a definition of offense and defense. You are asking me, in one sense, to say he is offensive, that is, receiving a defensive wound while he is being offensive.

Q. Right. Isn't that possible? That's what I am asking.

A. I don't quite understand what you are saying.

Q. In other words, isn't it possible for a person to ward off a knife defensively and still be on the attack himself?

[105] A. I think if you emperically look at what you are describing as defensive wounds, just from an empirical basis, then you have to call them defensive wounds, as I did. A person who is in an offensive position is not likely to have the palm of his hands open, nor is he likely to get cut in these positions. He gets cut in these positions in a defensive effort.

Now, what his activities were, I can't say. All I can say is that these are well defined areas which we call defensive wounds.

Q. Right. I am not arguing with the characterization of the wounds. My point is trying to establish—

THE COURT: I don't think you can make the point with the question. He has answered the question.

MR. GASTON: Well, if I may make another attempt.

THE COURT: You don't do so over the ruling of the Court, counsel.

MR. GASTON: With a rephrasing of the question, Your Honor.

THE COURT: If the jury understands and the Court understands your question, insofar as the hands and the arm wounds are concerned, he was in what you characterized medically as a defensive position?

THE WITNESS: That is correct.

THE COURT: What his position was prior to that [106] time, you have no way of telling, is that correct?

THE WITNESS: That is correct.

BY MR. GASTON:

Q. Then you mean defensive as to the knife?

THE COURT: As to whatever instrument inflicted the injury.

THE WITNESS: I mean defensive in relationship to the wounds, the wounds of the hands and the arms.

MR. GASTON: I have no other questions, Your Honor.

MR. CLARKE: I have no further questions, Your Honor. May the doctor be excused?

THE COURT: Yes, you may be excused.

(Witness excused.)

THE COURT: Do you want to come to the bench a minute, counsel.

(At the bench:)

THE COURT: Who is your next witness?

MR. CLARKE: I have Officer Laughery of the Mobile Crime Lab.

THE COURT: Who is after Laughery?

MR. CLARKE: Lieutenant Alexander, and then there is a possibility of a stipulation ending the case, or I might have to call the nurse. I will have to check.

THE COURT: About what?

MR. CLARKE: The nurse from the Department of [107] Corrections, Womens Detention Center, as to whether or not this defendant had any cuts or bruises on her when she was admitted.

THE COURT: Then we will take our recess. That should give you time to talk to this other witness.

MR. GASTON: Is he back here now?

THE COURT: Check with the marshal, Mr. Kelly.

(In open Court.)

THE COURT: Ladies and gentlemen of the jury, we are going to recess this trial until 1:45. If you can enjoy your lunch after the coroner's testimony, do so. 1:45.

(Luncheon recess taken.)

[108] AFTERNOON SESSION

(The trial resumed at 2:02 p.m., the defendant being present.)

THE COURT: Are we ready to proceed?

MR. CLARKE: Yes, Your Honor. Before we proceed, I would just like to point out one thing to the Court.

Over the luncheon recess I spoke to Mr. Griffin who is in the cell block. When Mr. Griffin was first interviewed by the police approximately two hours after this episode, he gave a statement to the police saying that he saw the way the knife was being held. The handle, as the statement goes, the handle was in the defendant's hand. The blade was in the deceased's hand.

Mr. Griffin spoke to me in my office in February when he was in jail. I called him up the week before February 18th. That would be February 11th. At that time he also told me the same story.

However, in the cell block now he tells me that it was a different way. I cannot claim surprise if he testifies on the stand as to what he told me in the cell block, since that is what he just told me at this point. However, I will seek to refresh his recollection if it appears that possibly his recollection is hazy, at this point.

I would just like to point that out to the Court before we proceed.

[109] MR. GASTON: Your Honor, I also spoke with Mr. Griffin and he told me that—he didn't tell me he could tell me which way the knife was pointing—just that

he couldn't tell, just that the two of them were grabbing.

Also, at this time, Your Honor, the reason I might want to call Officer Horstkamp which I mentioned earlier is that during the grand jury, he testified that he had a conversation with Mrs. Sewell, and that she told him that he carried a knife and that he carried it in a sheath, and that is contrary to her testimony. That would be my reason for having him here.

I would ask at this time that he be called so that he will be ready for the defense case.

THE COURT: Is he available?

MR. CLARKE: Yes, Your Honor. The detective-sergeant knows where Officer Hortskamp is at this time, and I still have him called. However, I think the witness who will be testifying, Mr. Griffin, will obviate any need to call Detective Hortskamp, because Mr. Griffin will testify that at the time Sewell registered at the motel, he noticed a sheath on the man's side. So that could obviate the problem at that point.

MR. GASTON: It could well, Your Honor.

THE COURT: All right. Have the jury come in.

(The jury enters the courtroom at 2:05 p.m.)

[110] THE COURT: Would you call your next witness, please.

MR. CLARKE: With the Court's permission, the Government will call Sherman Clarke Griffin.

Whereupon,

SHERMAN C. GRIFFIN

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CLARKE:

Q. Will you please speak into the microphone, sir, and keeping your voice up, will you give us your name?

A. Sherman Griffin.

Q. Mr. Griffin, try to move forward a little bit and speak into the microphone, if you can.
A. Sherman Griffin.
Q. Mr. Griffin, going back to September 24, 1971, a Friday about a year ago, do you know where you were working on that day?
A. Yes.
Q. Where was that, sir?
A. Buddies Tourist Home, N.W.
Q. Now, Mr. Griffin, going back to that day, again, did you see anyone on that day that you now see in Court?
A. Yes.
[111] Q. Who is that?
A. The defendant.
Q. Will you point her out. Try to keep your voice up.
A. The young lady there.
MR. CLARKE: Your Honor, may the record reflect the witness has pointed to the defendant.
THE COURT: It may.
BY MR. CLARKE:
Q. Mr. Griffin, was that the first time you have ever seen this individual before?
A. No.
Q. When had you seen her before? How many times, first of all, would you say you had seen her before that day?
A. About two or three times.
Q. Where did you see her before?
A. I have seen her at the tourist home and I have seen her, again, on the street.
Q. When you have seen her at the tourist home, was she by herself?
A. No.
Q. Was she with anyone else?
A. She was with a young man.
Q. Was that each time? How many times did you see her at the tourist home, would you say?
[112] A. About two or three times.

Q. During what year, month, or period of time, can you give us an estimate?
A. The month of August and September.
Q. Now, when you saw her those times, do you know whether or not she just walked into the tourist home or was she renting a room?
A. She came in with a young man, so I assumed she rented a room.
Q. How long were these rooms rented for?
A. Did you say how long are they rented for?
Q. Yes.
A. Well, by the day or the night or the week.
Q. Is there any lesser period of time that they can rent the rooms for?
A. Yes.
Q. What is that period of time?
A. Oh, three hours or less.
Q. Do you know how long she stayed in the room or stayed at Buddies Tourist Home on those days?
A. No, not really. Sometimes she would come in and go out in the course of an hour or three hours, and then other times, I didn't know, really.
Q. Now, Mr. Griffin, going on to this day the 24th of September, 1971, did anything unusual happen on that day to you?
[113] A. Yes.
Q. About what time was it?
A. It was in the afternoon. I couldn't say the exact time. It was in the afternoon.
Q. Can you tell us where you were at that time?
A. I was working there.
Q. Whereabouts were you working?
A. There are two parts to the building. I was on the first side of one side of the building.
Q. See if we can describe it by way of Fifth Street, and what is the other?
A. Both parts are on Fifth Street. One is, I think it is 1320, and the other part of the building is 1322.
Q. What part were you in?
A. 1320.

Q. Now, immediately prior to this time that we are speaking about and the time when you first saw this individual, the defendant, that day, was she with anyone when you first saw her on that Friday?

A. Yes.

Q. Now, the individual that she was with, this is when they were registering for the room?

A. Yes.

Q. Did you notice if he had anything on him at that time, any weapon of any sort?

[114] A. Yes, I did.

Q. What did you notice?

A. It was a Bowie Knife.

Q. Where was it?

A. In a sheath on his side.

Q. This is immediately before they registered, is that correct?

A. Yes.

Q. After they registered and went in the room, did anything unusual happen?

A. Yes.

Q. Can you tell us about that?

A. I guess about five or ten minutes after they were in the room, the young lady screamed help, and then she continued to do so until we broke into the room.

Q. When you broke in the room, what did you notice?

A. Well, I noticed she was partly on the bed and on the floor, and the young man was on top of her.

Q. Did you notice how she was dressed, if at all, when you went in there?

A. She had on a blouse and a pair of dungarees.

Q. What about on her feet?

A. She had her shoes on.

Q. Now, you indicated she had a blouse on. Do you remember the color?

[115] A. It was dark in color.

Q. Did she appear to be fully clothed to you?

A. Yes.

Q. Now, what happened after that, what about the man? Was he fully clothed?

A. No. I think his upper body was naked.

Q. Now, what did you once you entered?

A. What did I do?

Q. Once you entered the room and you saw the man and the woman, what did you do?

A. Well, Lawrence Smith and myself and another older gentleman tried to separate them.

Q. Can you tell us what did you do and what happened?

A. They were struggling and she was continually screaming "Help" when we broke into the room, and we separated them, and right after that she left out.

Q. Can you tell us how did she leave the room, what did she do?

A. She left because she was afraid to death.

Q. Did she walk out slowly?

A. No.

Q. How did she leave?

A. Well, from the time it took us to separate them until the time I looked around, she was gone.

Q. Now, Mr. Griffin, when you got into the room, were [116] you able to see a knife?

A. Yes.

Q. Where was that knife?

A. In both the defendant and the young man's hand.

Q. Do you remember today who was holding it and how that knife was being held?

A. They were both holding the knife.

Q. Do you remember how they were holding it?

A. Well, they were both holding it as though neither one of them wanted the thing used on them.

Q. Do you remember whether or not you were able to see the handle?

A. Well, as I can recall, it seems that—well, I can't, I am not really positive now because I don't know who was holding the blade or the handle, but both of them were holding the knife. I may have said previously that the lady was holding the handle and the man was holding the blade part, but it could have been either way because in our hurry to get them apart, that's all we were really trying to do.

Q. Okay. Now, Mr. Griffin, let me go back to what you were just saying then. After this incident, in about, say, two hours later, did you go down to the police station and talk to a police officer around 6:50?

A. Yes.

Q. Do you remember that police officer asking you what [117] you saw that time?

A. Yes.

Q. Do you remember telling the police officer exactly what you saw?

A. Yes.

Q. Now, were you trying to be as accurate and as truthful as you could be at that time?

A. Yes.

Q. Now, at the time you spoke to the police officer, is that the time you were speaking about when you told or said that the woman had the handle and the man had the blade?

A. I may have said that. I am quite sure I said that.

Q. And at that time you were trying to be as honest as you could?

A. Yes.

Q. And that was the best of your memory at that time?

A. Yes.

MR. CLARKE: May I have the Court's indulgence for a second.

I have no further questions.

THE COURT: Have you ever seen the man before the defendant was with?

THE WITNESS: I can't really remember ever seeing him before.

THE COURT: You may inquire.

[118] CROSS-EXAMINATION

BY MR. GASTON:

Q. Mr. Griffin, you stated that you heard some screaming?

A. Yes.

Q. Was that a male or a female?

A. Female.

Q. Did you ever hear a male voice?

A. No, I never heard it once.

Q. Had other people checked into the tourist home that day?

A. Yes.

Q. How many others?

A. Maybe two or three couples during that time. There were others after then or before then, but during the time they came in, there couldn't be over two or three couples.

MR. GASTON: I have no other questions, Your Honor.

REDIRECT EXAMINATION

BY MR. CLARKE:

Q. Do you know if anyone else used that Room No. 2 immediately prior or before the defendant and the man went in there?

A. Yes, before they went in, sure.

Q. How long before?

A. I couldn't say definitely.

[119] Q. Do you know if it was used that day?

A. Yes, it was used that day.

Q. Do you know if it was cleaned up afterwards?

A. Yes.

Q. Now, you said that you didn't hear a male voice before you got in there, is that correct?

A. No, I didn't.

Q. Did you hear a male's voice from the room?

A. No, I said I didn't hear a male voice from that room.

Q. After you got into the room itself, did the man say anything.

A. No.

Q. Was he able to talk at all?

A. I don't know whether he was able to. He didn't.

MR. CLARKE: I have no further questions, Your Honor.

MR. GASTON: No questions, Your Honor.

THE COURT: All right. You may step down.

MR. CLARKE: Your Honor, may the witness be excused at this point?

THE COURT: Yes.

(Witness returns to the lockup.)

MR. CLARKE: The Government will now call Officer Laughery, with the Court's permission.

[120] Whereupon,

ROBERT E. LAUGHERY

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CLARKE:

Q. Will you please state your name, and spell your last name for the court reporter?

A. Robert E. Laughery, L-a-u-g-h-e-r-y, assigned to the Mobile Crew Lab, Metropolitan Police Department.

Q. Officer Laughery, going back to September 24, 1971, what was your assignment at that time?

A. It was Mobile Crime Lab Technician.

Q. Will you please explain to the Court and to the ladies and gentlemen of the jury exactly what the duties are of a mobile crime technician.

A. To respond to scenes of major crimes upon request of the investigator, to photograph the scene, collect physical evidence, process it, process for latent prints, preserve the evidence and send it to various bureaus, if requested.

Q. Officer, are you familiar with what preserving the crime scene means, prior to the time that you arrive there?

A. I beg your pardon?

Q. Are you familiar with what preserving the crime scene means prior to the time that you arrive there?

[121] A. The officer remaining on the scene will protect the scene until I arrive.

Q. What do you do when you first arrive on the scene after a crime scene has been preserved?

A. We photograph the scene in black and white photography and color photography.

Q. Is this before anything is moved?

A. Yes, sir.

Q. Going back to this day, the 24th of September, did you have an occasion to go to 1320 5th Street, N. W., in the District of Columbia?

A. Yes, sir.

Q. Did you go to any particular room or area in that place?

A. Yes, sir. It was a room on the first floor.

Q. Officer, going back to that day, again, can you tell us about what time it was of the day or night that you arrived there?

A. Yes, sir. I arrived on the scene at 3:30 p.m.

Q. Can you check that time again?

A. I have, on the scene from 1730 hours to—

Q. That is 1730 hours?

A. Yes, sir.

Q. What would that be—

A. I'm sorry. Five-thirty.

[122] Q. Five-thirty p.m.?

A. Yes, sir.

Q. When you arrive there, what did you do at that time?

A. We recorded the scene in photography and made a diagram, a rough chart.

THE DEPUTY CLERK: Government Exhibit 17-A through 17-G marked for identification.

(Government Exhibit Nos. 17-A through 17-G was marked for identification.)

MR. CLARKE: Your Honor, may the record reflect I am now showing them to defense counsel.

THE COURT: Very well.

BY MR. CLARKE:

Q. Officer Laughery, I am now showing you what has been marked for identification as Government Exhibit

17-A through 17-G, and I would ask, first of all, that we start with 17-A, which is the bottom one. They are all in sequence. As to Government's Exhibit 17-A, can you identify that?

A. Yes, sir. That is a photograph of nightstand against the wall.

Q. Was that nightstand located in Room No. 2 at the address that you went to on that date, the 24th?

A. Yes.

Q. Let me ask you this, Officer: How many rooms did [123] you go to on that day?

A. Just the scene itself.

Q. Was that nightstand located at the scene?

A. Yes, sir.

Q. When was that picture taken, do you know?

A. That was taken on September 14th.

Q. At the time that you went there?

A. Yes.

Q. Does that accurately depict what the area or the nightstand looked like?

A. Yes, sir, it does.

Q. Are there any items being displayed in that?

A. This is a man's wallet which I recovered from the scene, a photograph of a green shirt, and, also—

Q. Was that wallet in the same condition when you took that picture as it was when you first arrived on the scene?

A. Yes, sir. There is also a blue shirt that was on top of the stand.

Q. Going on to Government Exhibit 17-B, can you identify that particular item?

A. That's a pair of men's brown shoes.

Q. Is that a picture of the scene again?

A. Yes, sir, it is.

Q. Does that picture accurately depict what is shown in that picture as you saw it at the time you arrived on the [124] scene?

A. Yes, sir.

Q. Was anything moved in that picture before it was taken?

A. I beg your pardon?

Q. Was anything moved in that picture from the time you arrived until you took this photograph?

A. No, sir.

Q. Going on to Government Exhibit 17-C—to save time, take a look at 17-C through 17-G, the rest of the pictures you have in your hand.

Do all of those pictures accurately depict what they represent as you saw it at the time you arrived on the scene on September 24, 1971?

A. Yes, sir.

Q. Had anything shown in those pictures been moved from the time you arrived there until the time you took those pictures?

A. No, sir.

MR. CLARKE: Now, Officer, at this time I would ask that you step down and come over here to the blackboard.

(Witness goes to the blackboard.)

BY MR. CLARKE:

Q. Now, Officer, standing over here in the corner, I will give you this pointer, and, again, hand you this microphone. [125] Now, at this time would you please take a look at Government Exhibit No. 9 for identification. See if you can stand over a little bit more so there is no problem with the Court and everybody else seeing the diagram.

Will you please take a look at Government Exhibit No. 9, the diagram before you. Have you ever seen that before? The one right in front of you.

A. Yes, I have seen it before.

Q. Do you know how it was made?

A. Yes, sir. That is a reproduction of my original sketch made on the scene.

Q. Now, going to that diagram, again, Government Exhibit No. 9, and before we go to that, I would like to show you what has been marked for identification as Government Exhibit No. 1. Can you identify that particular item?

A. That is a cannister.

Q. Try to keep your voice up.

A. A cannister in which I placed the yellow metal ring from the scene that was recovered underneath the bed in the bedroom.

Q. Now, will you please place on that diagram with the green pen the No. 1 to indicate where that ring was found.

A. It was recovered under the bed approximately in this area (indicating).

Q. Place the Figure 1 there. That would be underneath [126] the bed, is that correct?

A. Yes, sir.

Q. I now show you what has been marked as Government Exhibit No. 2 for identification. Can you identify that particular item?

A. Yes, sir. That's the brown wallet that was found on the nightstand.

Q. Will you please mark that with the number 2 where that wallet was located.

A. It was located on the desk closest to the door.

Q. Contained in Government Exhibit No. 2 are certain papers. Were those papers in or around the wallet at the time you first saw it?

A. They were scattered about on the desk and a few were on the floor.

Q. Was there any money found in the wallet?

A. No, sir.

Q. Was there any money found around the wallet?

A. No, sir.

Q. Was there any money found in the whole room?

A. No, sir.

Q. Officer, I would like to show you now Government Exhibit No. 3 for identification. Can you identify that item? Try to keep your voice up.

A. Yes, sir. These were the blue slacks with the belt [127] turned over to me by the investigator.

Q. Would that be Joseph Quantrell of the First District?

A. Yes, sir.

Q. I would like to show you what has been marked as Government Exhibit No. 4 for identification. Can you identify that?

A. Yes, sir. This is the blue shirt which I recovered from the nightstand on the scene.

Q. Will you please mark on the diagram where that blue shirt was found.

A. Right here (indicating).

Q. I now show you what has been marked as Government Exhibit No. 5 for identification. Can you identify that?

A. Yes, sir.

Q. What do you identify that as?

A. It's a green undershirt. It was recovered from the nightstand on the scene.

Q. Will you please mark on the diagram where that was recovered from.

A. (Indicating.)

Q. I now show you what has been marked as Government Exhibit No. 6 for identification. Can you identify that?

A. It is a pair of undershorts.

Q. Do you know where they were recovered, if any place?

[128] A. If I may refer to my notes, sir.

Q. Yes.

A. They were also with the clothing on the nightstand.

Q. Will you please mark with the number 6 where they were recovered.

A. (Indicating.)

Q. I am now showing you what has been marked as Government Exhibit No. 7 for identification. Can you identify those items?

A. Yes, sir.

Q. What do you identify them as and where were they recovered, if any place?

A. A pair of shoes recovered from underneath the nightstand.

Q. Will you please mark with number 7 where that would be.

A. (Indicating.)

Q. Now, showing you what has been marked as Government Exhibits 11, 12 and 13 for identification, I would ask first that you take a look at Government Exhibit No. 11. Can you identify that item?

A. Yes, sir.

Q. What do you identify it as?

A. I describe it as a Bowie Knife.

Q. Did you see that before?

[129] A. Yes, sir.

Q. Where did you see it?

A. It was turned over to me on the scene by Sergeant Jenipher of the District.

Q. Do you know what it was turned over to you in?

A. A brown paper bag, sir.

Q. Was there anything else in the bag at the time it was turned over to you?

A. Yes, sir. Items marked as 12 and 13.

Q. Indicating the small knife and the sheath?

A. Yes, sir.

Q. I am now going to show you what has been marked as Government Exhibit 14 for identification. Can you identify that?

A. Yes, sir.

Q. What do you identify it as?

A. It's a pocket knife that was turned over to me by the First District investigator, along with a prophylactic.

MR. CLARKE: At this time, Your Honor, I would ask that this item be marked as Government Exhibit 18.

THE DEPUTY CLERK: Government Exhibit No. 18 marked for identification.

(Government Exhibit No. 18 was marked for identification.)

[130] BY MR. CLARKE:

Q. Now, Officer, I am just going to place here Government Exhibit No. 18 for identification, and I would ask that you don't open it up. Can you identify that?

A. May I look at it?

Q. You may. Can you identify it?

A. Yes, sir.

Q. What do you identify it as?

A. It's a cannister in which I placed a prophylactic that was recovered from the scene and placed in that cannister.

Q. Where was the prophylactic found on the scene?

A. It was recovered under the bed nearest the wall.

Q. Will you please mark with an 18 whereabouts it would be where it was found.

A. (Indicating.)

Q. Now, Officer, was that in a used or unused condition when found?

A. It was unfolded from the way in which you purchase them and it appeared to me through the strong odor that it may have been used.

MR. CLARKE: You may resume the stand.

(Witness resumes the stand.)

BY MR. CLARKE:

Q. Officer, do you know if any piece of evidence was picked up at the morgue or from the medical examiner shortly [131] after this episode?

A. Yes, sir, there was.

Q. What was that?

A. It was blood from the decedent.

Q. Do you know if anything was done with that or any other items which have been exhibited to you?

A. Yes, sir.

Q. What was that, sir?

A. I took several of the items consisting of the two knives, the sheath, the sample of blood which was turned over to me by the technician.

Q. Now, when we are talking about two knives, we actually have three here—Government Exhibits 11, 12 and 14, if can find it, for identification. Which knives are you talking about?

A. Exhibits 11 and 12, and the sheath.

Q. Indicating the Bowie knife in this hand and the little knife?

A. Yes, sir.

Q. What did you do with the four items—the two knives, the sheath and the sample of blood?

A. And, also, the white pillow case, I took them and delivered them to the FBI for a blood test.

Q. When you say blood test, what do you mean?

A. For grouping and, also, for identification of blood [132] on the—

MR. CLARKE: May I have the Court's indulgence for a second. Your Honor, may counsel approach the bench a second.

THE COURT: Surely.

(At the bench:)

MR. CLARKE: Your Honor, I have conferred with Mr. Gaston on this one point. All of this is, in a sense, hearsay, that the officer—I will ask him at this point to testify as to the results of the examination. Mr. Gaston has indicated he has no objection.

THE COURT: In relation to what?

MR. CLARKE: The grouping was found Type O. There was blood found on the hunting knife but insufficient to group. No blood was found on the sheath or on the little knife.

MR. GASTON: I have no objection.

THE COURT: All right.

(In open Court:)

BY MR. CLARKE:

Q. Officer Laughery, are you familiar with the results obtained from the FBI Laboratory as to the requests that you had made?

A. Yes, sir.

Q. Do you know whether or not they were able to group the blood, the sample blood that was given to them? [133] A. Yes, they were.

Q. What was that grouping?

A. The report indicates Type O.

Q. Do you know whether or not as to Government's Exhibit No. 11, the Bowie Knife, the FBI reported whether or not there was any blood, human blood found on that item?

A. There was on the Bowie Knife, there was blood, human blood found on it.

Q. Were they able to group that blood?

A. No, sir.

Q. Now, as to Government Exhibit No. 12 for identification, the other knife that was brought over there, do you know whether or not there was any blood or human blood found on that item?

A. The report indicated no blood on it.

Q. And as to Government Exhibit 13, the sheath.

A. No blood was found on it.

MR. CLARKE: May I have the Court's indulgence a second.

BY MR. CLARKE:

Q. Officer, do you know whether or not you saw any soap in that room?

A. Yes, I did.

MR. CLARKE: Will you please, again, step over to the blackboard and will you indicate with the letter S where it [134] was you noticed the soap.

(Witness indicates on diagram and then resumes the witness stand.)

BY MR. CLARKE:

Q. Now, Officer, I am going to show you what has been marked for identification as Government Exhibit 17-F and I would ask that you look at that item and see if you can see the soap in there?

A. No, sir, not the soap.

Q. Is there anything shown in that particular—

A. It is a soap wrapper.

Q. Where was that located?

A. That was on the window which housed the air conditioner to the right of the sink.

Q. Now, was the soap that saw on the sink, was it encased in a wrapper?

A. No, sir, it wasn't.

Q. Will you please mark on 17-F with a circle the wrapper we are talking about so the record is clear.

A. (Indicating.)

Q. Place your initials, there too.

A. (Indicating.)

MR. CLARKE: I have no further questions, Your Honor.

[135] CROSS-EXAMINATION

BY MR. GASTON:

Q. Officer, anywhere in this room did you find any after-shave lotion or deodorant?

A. No, sir.

Q. No brown paper bag containing those items?

A. No, sir.

MR. GASTON: No other questions.

MR. CLARKE: May the witness be excused at this point?

THE COURT: Very well.

(Witness excused.)

MR. CLARKE: With the Court's permission, the Government will call Detective Sergeant Alexander.

Whereupon,

STANLEY E. ALEXANDER

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CLARKE:

Q. Will you state your name, sir.

A. Stanley E. Alexander.

Q. What is your occupation?

A. Detective Sergeant, Homicide Department, Washington, D. C.

[136] Q. Detective Sergeant, going back to September 25, 1971, what was your occupation at that time ?

A. Homicide investigator.

Q. Going back to that date, did you have an occasion to see anyone that you now see in Court today?

A. Yes, sir.

Q. Who is that?

A. That lady sitting at the table over there.

Q. Describe the dress she is wearing.

A. I believe it is dark brown, and black sweater.

MR. CLARKE: Your Honor, may the record reflect the witness has pointed to the defendant?

THE COURT: Very well.

BY MR. CLARKE:

Q. Now, Officer, will you please indicate about what time it was in the day or night you saw her and where did you see her?

A. Yes, sir. It was about 10:25 a.m. Saturday morning, September 25, 1971, in the Homicide office.

Q. Was she by herself?

A. No, sir.

Q. Who was she with?

A. Her husband Samuel, and, I believe, her sister Vivian.

Q. Can you please indicate when you saw Mrs. Agurs at [137] that time whether or not you had any conversation with her?

A. Yes, sir.

Q. Will you also indicate what that was, what happened, what was said, if anything?

A. Yes, sir. She was brought to my attention by Sergeant Spencer. He advised me that this was the lady that we wanted for the case in question, and would I talk to her and process her. He had already advised her of her rights and stated that she was not going to give us a statement.

Q. She was advised of her rights, is that correct?

A. Yes, sir.

Q. Then you were preparing the paper work and speaking with her, is that correct?

A. Yes, sir.

Q. What if anything did she say, and how did it come about?

A. I was typing, I believe, the police department Form 163 that we make out on people, and during the conversation she asked me was there a knife found. I stated there were two knives found. She stated there was only one. At that time her husband Samuel asked her—

MR. GASTON: Your Honor, I am going to object to this as hearsay.

THE COURT: Let's talk about what she said.

THE WITNESS: Yes, sir.

[138] There was a question asked her. She stated "He was holding it when I left."

BY MR. CLARKE:

Q. Sergeant Alexander, when an individual comes in who is a suspect, or a defendant in a homicide case, do you have any standard procedure which you utilize in order, do you look for anything in particular when a person comes in and you have an interview of someone like that and they are a suspect or a defendant in a homicide case?

A. Yes, sir.

Q. What is that, sir?

A. While we are talking to them we will look for injuries on the body, visible injuries.

Q. What do you do if you find any?

A. We will ask them, question them as to how they received them.

Q. Now, as to this particular case, did you notice any injuries upon Mrs. Agurs—her face, her arms, her hand, any item that was exposed to you, any part of her body that was exposed?

A. To the best of my knowledge sir, and after referring to my notes, I did not see any injury to Mrs. Agurs.

Q. If you had seen any injury, what would you have done besides question them about it?

A. I would have made a notation of it. What we

[139] generally do is have it brought to the attention of the Identification Section and have colored photos taken of that injury.

Q. In this case did you make any notes as to injury?

A. No, sir.

Q. Were any photographs taken?

A. No, sir. I beg your pardon—there was a photograph taken, but not of an injury. That was in the processing.

Q. That's the normal procedure—taking a photograph?

A. Yes, sir.

MR. CLARKE: I have no further questions, Your Honor.

CROSS-EXAMINATION

BY MR. GASTON:

Q. Officer, the examination you performed, was that just from the distance of talking to her?

A. Yes, sir.

Q. So underclothing or something like that, she could well have an injury?

A. We are not allowed to touch a woman, sir.

Q. So the answer to the question is no?

A. I didn't see any, no.

Q. But she might have had—

MR. CLARKE: Objection, Your Honor.

THE COURT: Sustained.

[140] BY MR. GASTON:

Q. She showed up voluntarily at the police department, did she not?

A. That is correct, sir.

MR. [GASTON: I have no other questions.

MR. CLARKE: I have no further questions, Your Honor. May the witness be excused?

THE COURT: Yes, Sergeant, you may be excused.

(Witness excused.)

MR. CLARKE: Your Honor, before I call my next witness, may counsel approach the bench for a second?

THE COURT: Very well.

MR. CLARKE: I would also add, Your Honor, that this is the last witness for the Government.

(At the bench:)

MR. CLARKE: Your Honor, my next witness is a Mrs. Brazier. She is a nurse at the Women's Detention Center, and it will be a matter of formality of introduction of records, medical records taken at the time this defendant was admitted to the Women's Detention Center.

Up until recently I felt we would have a stipulation—actually, it is the Government's own stipulation, and I see in this case that we don't have a stipulation because counsel has indicated there was a cut on one of the defendant's hands, but I had nothing to show that, so I couldn't stipulate [141] to that one fact. I called Mrs. Brazier down right before we came back to Court. So I wonder if I could have the Court's indulgence for a second just to tell her what will happen when she comes in here to testify.

THE COURT: What do you mean, what will happen?

MR. CLARKE: As to the questions I will ask her.

THE COURT: Where is she from?

MR. CLARKE: She is a nurse at the Women's Detention Center.

THE COURT: She ought to have enough sense to respond to questions without your talking to her.

MR. CLARKE: Yes, Your Honor. But I just wanted for my own benefit to know exactly what she had to say so I don't put my foot in my mouth in a sense. It would only take about a minute, Your Honor, just outside the hall.

THE COURT: Very well.

MR. GASTON: Your Honor, may I inquire of Mr. Clarke as to whether or not he intends to have the notes which she drew up admitted into evidence?

MR. CLARKE: I will ask that they be admitted. I will have to do that in order to have her testify from it. But before they go the jury, I would have them excised. The problem that we have is this, Your Honor. The defendant is a user of narcotics, and on the notes themselves there is a description of drug usage, when is the last time the person [142] took any, and how much they took. And

I will make sure that is cut off before it goes to the jury. In fact, we could do it very easily. I will have her explain what the notes refer to and I will instruct her of this beforehand to stay away from any of the narcotics.

MR. GASTON: All right.

Whereupon,

JANE BRAZIER

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CLARKE:

Q. Will you please state your name, and spell your last name for the court reporter.

A. My name is Jane Brazier, B-r-a-z-i-e-r.

Q. Is that Miss or Mrs.?

A. Mrs.

Q. Mrs. Brazier, going back to September 25, 1971, did you have an occasion to see anyone that you now see in Court today?

A. September 25, 1971?

Q. September 25.

A. What did you say?

Q. Did you see anyone on that day that is in Court today?

[143] A. Yes, I did see the lady that night.

Q. Will you point her out, please.

A. She is sitting over there with the black dress.

MR. CLARKE: Your Honor, may the record reflect the witness has pointed to the defendant.

THE COURT: Very well.

BY MR. CLARKE:

Q. Can you tell us where it was that you saw Mrs. Agurs?

A. I saw her downstairs in the Medical Department of the Women's Detention Center.

Q. For what purpose did you see her there, why did you see her there?

A. She was sent down from Control for medication for her heroin habit.

Q. What is your position right now?

A. Registered nurse.

Q. At that time when Mrs. Agurs came down, did you have an occasion to examine her body?

A. Yes, I did.

Q. Did you look at her arms?

A. Yes.

Q. Her face?

A. Yes.

Q. Her legs?

A. Yes.

[144] Q. At that time that you were looking at her did you notice anything of a trauma, an injury, an incision wound, a bruise of some sort, a cut—anything like that?

A. No, there weren't any.

MR. CLARKE: I have no further questions, Your Honor.

MR. GASTON: Your Honor, may we approach the bench.

(At the bench:)

MR. GASTON: Your Honor, what I was afraid might happen, obviously, has happened. I don't know exactly what the best approach to be about it. Certainly the jury being asked to disregard the statement concerning her heroin could do nothing but draw their attention to that point. It seems to me the answer that occurs to me is to have her testimony as a whole stricken.

MR. CLARKE: Your Honor, I would like to say this one thing for the record. That just before Mrs. Brazier testified, I specifically told her not to mention anything at all about drugs, anything at all about scars or anything on the woman's arm pertaining to heroin—simply for the single purpose.

Now, it's against my instructions, I had no idea that would be coming up when it came out. There is nothing else I can say on that point.

As far as counsel's request that the testimony be [145] stricken, I don't see how what the witness said inadvertently on that point in any way affects the integrity of her other testimony. In fact, it doesn't affect her integrity at all.

THE COURT: I can't see any justification for striking her testimony.

MR. GASTON: Well, Your Honor, I don't see how the potential harm could be cured. The only other alternative that does occur to me is a mistrial.

THE COURT: On what ground?

MR. GASTON: That the defendant has been prejudiced.

THE COURT: How so?

MR. GASTON: By the statement to the ladies and gentlemen of the jury that she is a heroin addict.

MR. CLARKE: We would oppose a mistrial, Your Honor, on the grounds that is a statement that came out inadvertently. I stopped immediately. There is nothing else that goes into it.

As to how much harm it will have—

THE COURT: Do you think that her addiction is irrelevant to this woman?

MR. GASTON: I think the probative value, Your Honor, is far outweighed by the prejudicial effect it might have.

THE COURT: I disagree. I am not going to declare a mistrial. I see no justification for a mistrial. I think [146] it has a great deal of probative value, as a matter of fact.

As a practical matter, here is a married woman shacked up at 4:00 in the afternoon in a third rate tourist home, and her heroin addiction, you say, has no probative value.

MR. GASTON: I think that it is far outweighed by the prejudicial value, Your Honor.

THE COURT: It was not done pursuant to any instruction of the prosecutor.

MR. GASTON: Oh, no, Your Honor, I wouldn't suggest it was.

MR. CLARKE: Your Honor, the Government position is, basically, this is, first of all, it is probative. Of course, that is the whole reason for this whole thing taking place, that is the whole reason why she went to the room with the man in the first place. That is the reason that the rolling took place.

MR. GASTON: That is an assumption.

THE COURT: Well, according to the status of the evidence, the only money he had was $4 for the room at this point. There are other inferences.

MR. CLARKE: Your Honor, an hour before—

THE COURT: Other inferences: that these employees took the money.

MR. GASTON: That's right.

[147] THE COURT: There is no evidence that they did. The other inference is that the money, if he had any money, that she took it. Either are logical inferences.

MR. GASTON: Or that he left it at his father's. He left the after-shave and deodorant some place.

THE COURT: Where is there any evidence he went to his father's place?

MR. GASTON: Mrs. Sewell testified he was going there.

THE COURT: Was there evidence that he ever went to his father's place?

MR. GASTON: There is evidence that he left her going to his father's place.

THE COURT: He was supposed to go. He was going up 7th Street and he wound up in a tourist home.

MR. CLARKE: Forty-five minutes later. That is plenty of time to—

MR. GASTON: Somewhere he left off the after-shave lotion.

THE COURT: The inference is there. I am not declaring a mistrial.

(In open Court:)

CROSS-EXAMINATION

BY MR. GASTON:

Q. Ma'am, is there a Miss Pollack at the Detention [148] Center, also?

A. Yes, there is.

Q. What does she do there?

A. She is a registered nurse there.

Q. Does she perform these type of examinations, also?

A. She does, she takes the history on them at the place where they come in.

Q. Isn't it a fact that she did talk with Mrs. Agurs at the time Mr. Agurs came in?

A. Not the night she came in.

Q. She didn't?

A. No; she wasn't on duty that night.

Q. You examined her on that night?

A. Yes, I saw her on that night.

Q. Did Miss Pollack speak to her to your knowledge at a later time?

A. Miss Pollack saw her on the 27th of September 1971.

Q. Did Mrs. Agurs register any complaints to her?

A. The only notation she mentions is that she states homicide and she was going out on bond.

Q. She didn't say anything about a pain in the back, made no notes of that?

A. There isn't any notation on that day at all.

MR. GASTON: I have no other questions.

[149] THE WITNESS: She was also seen on 9/26 over at the main jail.

BY MR. GASTON:

Q. Who did she see there?

A. Miss Hathaway, a registered nurse.

Q. Do those notations indicate any registration of complaint by Mrs. Agurs?

A. No, there is no complaint of any injury.

MR. GASTON: I have no other questions, Your Honor.

REDIRECT EXAMINATION

BY MR. CLARKE:

Q. Mrs. Brazier, if anyone complains of injuries, is it noted?

A. Yes, it is noted.

Q. Have you looked through the files in this case to see if there are any conditions of back ache, a cut hand?

A. Yes. There is no notation at all on that.

MR. CLARKE: Thank you. I have no further questions. Thank you.

Your Honor, may the witness be excused at this point?

THE COURT: Yes.

(Witness excused.)

MR. CLARKE: Your Honor, at this point the Government would move into evidence Government Exhibits 1 [150] through 14. No. 15 has already been received. And Government Exhibits 16 through 18, inclusive.

MR. GASTON: I have no objection to any of the evidence being admitted except for the pocket knife or pen knife which the officer states he can't be positive was the same one he found.

THE COURT: Your objection is overruled. They will be received.

(Government Exhibit Nos. 1 through 14 and 16 through 18 were received in evidence.)

MR. CLARKE: At this time the Government would rest its case.

THE COURT: Very well. I think we will take a short recess, ladies and gentlemen. We will take a ten-minute recess.

(Short recess taken. Following which at 3:14 p.m. the proceedings resume outside the presence of the jury.)

THE COURT: The Government has rested, Mr. Gaston.

MR. GASTON: Yes, Your Honor. Your Honor, at this time I would move for a judgment of acquittal. The

basis for my motion is that the three people who were eyewitnesses or earwitnesses, to the event, or which could provide direct evidence of what occurred, all three agree that from the inside of this room they heard screams for help. They all agreed that [151] the screams were female, and all three agreed that once the door was broken down, they saw a man and woman on the bed struggling with each other, the man on top and the woman underneath, and at that time she was still screaming.

There was also the fact that the three men went in the room. At least one or two of them went over and grabbed the decedent off the top of Mrs. Agurs and then engaged in a struggle of some duration with the decedent to remove from him his possession of the knife.

From this evidence, Your Honor, I don't see how a reasonable person could find beyond a reasonable doubt that this killing wasn't done in self-defense.

Now, I understand that Mr. Clarke has a lot of circumstantial evidence from which he wishes to build a contrary theory, but all that evidence stares in the face of the sounds that were coming from that room, the screams for help, and what was seen upon entry into that room.

I might add that all of this evidence comes directly from Government witnesses. These are the people who have firsthand knowledge of what was occurring in that room. And everything they said leads to the conclusion of self-defense.

Further, Your Honor, I would submit that for that reason I would ask that the Court find as a matter of law that the defendant is not guilty, or direct a judgment of acquittal.

Also, it occurs to me that there is no real [152] evidence of any malice involved here. So should the Court decide not to render a judgment or direct a judgment of acquittal as to the entire indictment, I do think that the defendant is entitled to relief as to second degree and have it reduced to manslaughter.

Thank you.

MR. CLARKE: Your Honor, the Government would oppose the defense motions, basically, on this factor: although at the time the witnesses entered the room, the

decedent seemed to, or according to one witness, Mr. Smith, to be the aggressor according to Mr. Henderson it looked like he had the knife itself, and Mr. Griffin wasn't sure. But even if the Court takes Mr. Smith's testimony as being the criteria or the standard of what did happen, that does not change the fact that of the two people in the room, the decedent is the one who is all cut up. He is the one who has the various slashes and stab wounds to his body.

The defendant in this case didn't have any wounds, at least none that were apparent the next day when she was at police headquarters, nor when she was down at the Women's Detention Center later on that night.

So although at the end, a man in a locked room appears to be the agressor, that does not change the fact that the wounds on the individual, plus the circumstances which led to their being there and the situation of his clothes and [153] his lack of money at the time of the breaking into the room—all indicate a contrary result, namely, that he was the victim of an attack, whether it be by way of a rolling attempt or of some kind of mad attack on the defendant's part.

But the main thing is this, Your Honor: Under the standard for a motion for a judgment of acquittal, the Government submits the jury could find, not that they have to, but that they could find that this defendant did act with malice, especially the number of stab wounds would show that, and, also, if it was the result of a rolling situation, that she acted with malice inflicting these wounds, and not in a sense of self-defense.

And one point that goes to that, Your Honor, is the fact that the decedent did not have the sheath on his belt when he was in the hospital. The belt and the trousers were sent back, and the sheath was found in the room. And it could be assumed and inferred that the knife was up with the wallet, with everything else of his when he went into the bathroom, and when he came back, the knife was used to try to get the money that he had in his pocket.

We submit, Your Honor, there is clearly evidence here for the jury to make this particular case. And under the Holland case, even though the Government's evidence does not negate all other reasonable inferences, that the jury

could find beyond a reasonable doubt from the circumstantial evidence [154] this is what happened.

We submit the case should go to the jury.

THE COURT: Do you wish to respond, Mr. Gaston?

MR. GASTON: Yes, Your Honor. Your Honor, I would suggest that in the Holland case the direct evidence which may have been contrary to the circumstantial evidence wasn't as great as the direct evidence in this case.

Also, the main thrust of my argument is that while there is some circumstantial evidence, it's not sufficient for a reasonable man to find beyond a reasonable doubt that there was not set-defense in this case. All of the direct evidence is directly on, the thrust of this is that it was self-defense.

THE COURT: Is that why she left?

MR. GASTON: The Government testimony was she left because she was scared to death. That is what Mr. Griffin said.

THE COURT: She had three men come to her rescue.

MR. GASTON: Well, the testimony and the evidence from the witnesses, Your Honor, was that she was scared to death. I can see, I think it's perfectly reasonable to see how someone in that position might have been scared to death. I think if they were not, it would be unreasonable.

THE COURT: No. The evidence does not warrant at this stage a judgment of acquittal. And with respect to malice, all of the circumstances of the killing, such as they were as [155] revealed from the evidence, as sufficient. The jury may infer malice from the nature of the wounds, the number of wounds.

I will not direct a motion for a judgment of acquittal as to second degree.

Are you ready for the defense?

MR. GASTON: Your Honor, the defense has no witnesses. I have spoken with Mrs. Agurs at some length concerning whether or not she should testify, and I have advised her against him. I would like to have it on the record that she voluntarily goes along with my advice in that regard. She has told me that she does agree not to go on the stand.

THE COURT: Is this correct, Mrs. Agurs, that you do not wish to testify in this case?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand you have a perfect right to testify?

THE DEFENDANT: Yes, sir.

THE COURT: If with the advice of counsel you do not choose to testify, you have that right, also. But it must be clear, if you want to testify, you can. I understand from Mr. Gaston you have conferred with him about that. He has given you certain advice, and you concur. You agree in the advice that he has given you. Is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Do you want to recess and [156] discuss instructions?

MR. CLARKE: Yes, Your Honor, I think it would be good to do so before argument.

THE COURT: Do you have any special instructions prepared, Mr. Gaston?

MR. GASTON: I have no special instructions, Your Honor. I do have some requests in regard to the ordinary instructions used, but I don't anticipate any problems.

THE COURT: Let's confer in chambers, and I think we can get those together in relatively short order.

MR. CLARKE: Your Honor, will the Court be having arguments today or tomorrow morning? I anticipate the Government argument will probably be about 15 minutes, since it is basically a circumstantial case.

THE COURT: I don't see why we can't get it to the jury today. I don't see any reason why we can't.

MR. CLARK: The Government is ready to argue today, Your Honor.

MR. GASTON: The defense is ready, Your Honor.

THE COURT: I think we ought to move then. All right. I will see you in chambers.

(Counsel and the Court confer in chambers from 3:25 p.m. until 3:55 p.m., when the following proceedings are had in open Court:)

THE COURT: Just have them—

[157] MR. GASTON: Your Honor, before the jury comes out, it might be a good time for me to renew my motion for a judgment of acquittal, if I indicate I don't want to say anything further. I just want to for the record.

THE COURT: Yes, and it is denied on the same grounds it was originally denied.

(The jury enters the courtroom.)

THE COURT: Ladies and gentlemen of the jury, there is no more evidence to presented to you in this case. And there remains, therefore, just two things to be done:

One, argument of counsel with respect to the evidence that has been presented, and then the Court's instruction as to the law that pertains to this case.

In view of the hour, we are going to ajourn the trial until tomorrow morning. I will ask you to return at 10:00 tomorrow morning, because I have some preliminary matters in the morning, but at 10:00 tomorrow anticipate that we will be prepared for argument of counsel and the Court's instructions on the law.

Don't discuss any of it, please. All right. Good night.

(The jury leaves the courtroom.)

THE COURT: I will see counsel now in chambers.

(Whereupon the trial was adjourned at 3:58 p.m. to reconvene Friday, July 7, 1972.)

[158] UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 2081-71

UNITED STATES OF AMERICA

vs.

LINDA V. AGURS, DEFENDANT

Friday, July 7, 1972
Washington, D.C.

Trial (resumed) before The Honorable AUBREY E. ROBINSON, JR., United States District Judge, and a jury.

APPEARANCES:

JOHN O'B. CLARKE, Esq.
Assistant United States Attorney
For the Government

ROBERT T. GASTON, Esq.
For the Defendant

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[159] PROCEEDINGS

THE DEPUTY CLERK: Linda V. Agurs, Criminal Action 2081-71.

(Defendant present.)

MR. CLARK: Your Honor, as far as instructions go on this case, the Government indicated yesterday it would be requesting a special instruction on the right of self-defense and the right of the individual himself to retrieve property taken from him or prevent property being taken from him. After several discussions with the Chief of the Appellate Section, the Government at this time would withdraw that request and simply ask that when the Court is discussing the general theory of self-defense itself, as to whether or not an individual is an aggressor or not, that Court just mention the fact that an individual can be an agressor if they are trying to take someone's property as well as attacking someone.

MR. GASTON: Your Honor, I would object to that instruction on the ground that there is no evidence that there was any property there. It is true that a possible inference can be made that Mr. Sewell did have property there, but that type of instruction, it seems to me turn that possible inference into a fact on which the jury is to make a decision. And if it is given, I would ask that there be some notation that the person whose property is taken is only permitted to use a certain amount of force to protect that property, and if it is [160] excessive, then he himself becomes an aggressor.

THE COURT: I am not going to get all hung up with a lot of theory. I am going to explain to this jury in plain and simple language what the theory of self-defense is as it relates to the evidence in this case. And I am quite certain that I can make them understand it and at the same time satisfy the legal requirements of both the defense and the prosecutor in this case.

MR. GASTON: I have some other matters which I would like to discuss, if I might.

I would like to inquire first if Your Honor intends to give the usual instruction No. 13 which concerns the number of witnesses?

THE COURT: No, I don't.

MR. GASTON: Fine. I would also—Mr. Clarke indicated in the chambers yesterday that he intended to argue certain matters, and rather than interrupt his final argument, I would like to object to some of the things which I anticipate he will be arguing at the time.

I believe, for instance, that his argument that Mr. Sewell went out of the room and into the bathroom solely because he had his pants on is just mere speculation. There is just no evidence of that at all.

I feel the same way about evidence that while he was gone, she was going through his papers. That's mere [161] speculation.

It is arguments of that nature to which I would like to register an objection, and I would hope that my objection could be a continuing one so I would not have to interrupt.

MR. CLARK: Your Honor, as to those two points, I would submit that the Government has a right to argue any logical inference from the evidence itself. And in this case, Diagram No. 9, Government Exhibit No. 9, shows the bathroom is out, and as the witnesses have indicated, the entrance to the bathroom is out in the hallway.

The decedent in this case had completed an act of sexual intercourse, as is evidenced from the used condom which was found in the room. And the decedent was only wearing a pair of pants; his underwear had not been placed on. And we submit that the logical inference from that is that the individual had left the room and gone out into the hallway.

And after an act of intercourse, it is possible that he went, it is logical that he went to the bathroom, which that would be the only reason that he would have to put on pants as compared to not having started to get dressed by putting on underpants and then his pants.

As far as the defendant having gone through this individual's property, the wallet itself is spread out on the table as shown in Government's Exhibits 17-A through G, the wallet is spread out on the table and the contents are spread [162] around.

The decedent had approximately an hour before this event $345. At the time that he was taken to the hospital he didn't have anything, not even a cent. No change, no dollar bills.

We submit that it is a logical inference from the array of the property, the fact that he had no money, and, secondly, that the fight that did occur in that room, there was an argument over money in a rolling type situation. That is basically what the Government will be arguing.

MR. GASTON: If I may briefly respond. As to the evidence, that is, taking the photograph, there is obviously no dispute. But that wallet could have been disturbed by the three men who were in the room later. There is no evidence that Miss Agurs did that while Mr. Sewell was in the bathroom.

THE COURT: That is one inference that may be drawn from it. There is no testimony that they disturbed anything other than get the knife from Sewell when they went into the room. But there is no, there are only four people that went into that room, five people. One didn't stay very long. By his own admission, as soon as he saw that Smith and the other man were grappling for the knife, he left and he said he ran down 5th Street to look for the police. He didn't stay very long. So that left four people in the room—the defendant, the decedent, and Smith and the other employee.

[163] MR. GASTON: All right, Your Honor. I have one other point, if I might. Yesterday it came out in testimony that Mrs. Agurs had a heroin habit, and Mr. Clarke indicated to me yesterday that he might be arguing on the basis of that. I would object to that on the basis that the way that that evidence came out was in no fashion proper. It was a medical conclusion without any qualified expert testifying as to it. I think

it would be totally improper for Mr. Clarke to argue on the basis of evidence which came in improperly.

MR. CLARKE: Your Honor, I might be able to alleviate Mr. Gaston's concern here. The Government does not intend to argue the fact that this individual was a heroin addict, that is the reason she is a prostitute and that was the reason she was taking the property in the premises. And the reason we will not argue that, and we do not, first of all, we do consider it to be highly probative of facts in this case, especially through the whole prostitution arrangement and a rolling type situation—

THE COURT: I think so, too. I will permit the Government to reopen, if you wish, and lay it all on the record. The Government made the representation initially that they had no intention of developing that, and it was not done deliberately. It was an inadvertent response to a question.

It was, in a sense, the question could have been sharpened more precisely, but it wasn't, and the witness despite the admonition of the Government's attorney, came out with [164] something that the Government did not intend. Because they did not intend it, it is not expected that Mr. Clarke is going to argue it.

So you will have no problems, Mr. Gaston.

MR. GASTON: All right. May I inquire of Mr. Clarke as to whether he intends to argue that she is a prostitute?

MR. CLARK: Yes, Your Honor, definitely I will.

MR. GASTON: I would also like to enter an objection as to that.

THE COURT: Oh, Mr. Gaston, your objection is noted for the record and it is pro forma.

MR. GASTON: Thank you, Your Honor. I have nothing further.

MR. CLARK: Your Honor, the only thing further the Government has is yesterday counsel for both the Government and the defense and the Court had a discussion as to instructions in this case, and at that time the Government requested an instruction on flight.

And, again, the Government would for the record state that we would request a flight instruction in this case. And we base it on the fact that the defendant, after the decedent had been pulled off her—

THE COURT: I told you I am going to give a flight instruction.

MR. CLARK: Yes, Your Honor. I just want to make the record.

[165] MR. GASTON: I have nothing further, Your Honor.

THE COURT: All right. How much time do you want to argue this case?

MR. CLARK: Your Honor, I believe approximately 15 minutes for opening and 15 minutes for close.

THE COURT: Stick to the evidence and the inferences that can be drawn from the evidence, and keep your personal opinions out of it, and I won't have to interrupt either one of you.

MR. CLARKE: Yes, Your Honor.

THE COURT: But otherwise, I will.

MR. GASTON: Your Honor, I don't believe I will be taking more than 30 minutes.

THE COURT: Thirty minutes?

MR. GASTON: Yes, Your Honor. It is a second degree murder case. It could be shorter than that, but I certainly wouldn't want to go too short.

THE COURT: I'll tell you what you do, you look at those jurors over there as you are talking, because that is what it is all about. If you can keep them interested in what you have to say for 30 minutes, you are welcome to try, and still talk about the evidence in this case.

All right. Have the jury come in.

(The jury enters the courtroom at 11:02 a.m., at which point closing arguments are made to the jury, which are [166] not transcribed as a part of this record.)

INSTRUCTIONS TO JURY

THE COURT: Ladies and gentlemen of the jury, I told you that the Court had the responsibility of instructing you as to the law that applies to the evidence in this particular case.

It's your duty to accept the law as the Court gives it to you. It's your responsibility to consider all of the instructions as a whole, and you should not give any special attention or consideration to any one instruction. You should not disregard any instruction, and you have no right to question the wisdom of any of the rules of law.

It's the function of the jury to determine the facts, and I told you, you are the sole and exclusive judges of the facts in this case. You determine the weight and the value and the effect of the evidence. In that connection you determine the credibility of the witnesses.

Now, make your determination as to the facts in this case without any bias or prejudice or fear or favor toward anybody involved in the case on either side in the case. And consider the evidence in the light of your own observations and experience in the affairs of life.

Nothing that I have said or done during the course of this trial should be taken by you of any indication as to how I feel you should decide any question of fact. And if by [167] anything I have done, that indicates to you my opinion with respect to the evidence, you disregard it, because, I repeat, it's solely your prerogative to determine the facts from the evidence, and it's your prerogative to determine what the verdict in this case shall be.

You heard the evidence. The Court heard it. Counsel heard it. They have argued the evidence to you. If your recollection differs from what they recall the evidence to have been, again, it's your recollection that controls. They said to you quite candidly and accurately that what they said to you is not evidence in the case. They argue it, but what they say by way of argument is not evidence.

The evidence came from that witness stand. It came from the exhibits which have been admitted. And it came from the two stipulations that were entered into. That's the body of evidence from which you find the facts in this case.

Not the indictment. As I told you, you will recall, the indictment is a technical formal manner of accusing a person of a crime in order to bring him or her to trial. And you must not infer that the defendant is guilty because they have been indicted or draw any inference of guilt from the fact of indictment.

The trial Court in any jury case has the responsibility of ruling on questions of law. Those rulings most [168] frequently take place in connection with objections to questions put to witnesses.

If I sustained an objection to a question that was put to a witness during the course of this trial, you disregard the question and do not speculate as to what the answer to that question would have been had it been permitted. And by the same token, if a question and answer were excluded by the sustaining of an objection, you disregard that question and that answer because that doesn't form a part of the body of evidence from which you find the facts.

So we have got the testimony, we have got the stipulations and we have the exhibits. That's the body of evidence.

Now, this body of evidence can be, as has been argued to you, divided into two basic kinds: direct and circumstantial evidence.

Well, direct evidence is the testimony of one who asserts actual knowledge of a fact, or in this case, like the testimony of the witness who said he saw two people do such and such a thing, or the witness Smith who said that he recognized this defendant and this decedent. That is direct evidence.

Circumstantial evidence, on the other hand, is proof of a chain of facts or circumstances. Tending to indicate either the guilt or the innocence of the defendant. [169] The law makes no distinction between the weight that you ladies and gentlemen of the jury are to give

direct evidence on the one hand and circumstantial evidence on the other. The law does not require a greater degree of certainty with respect to circumstantial evidence than it requires with respect to direct.

You have the responsibility of weighing all of the evidence in the case whether it's direct or circumstantial, or a combination of both, and if after a fair evaluation of that evidence, you are not convinced of the guilt of the defendant beyond a reasonable doubt, then you have an obligation to acquit her.

I suggested to you at the outset by way of preliminary instructions that much of the evidence would come through the testimony of witnesses, and you have to judge their credibility. You are the sole judges of their credibility. You determine whether to believe any witness and the extent to which any witness should be believed. If there is conflict in the testimony of witnesses, you have got to resolve the conflict and determine where the truth lies.

With respect to this evaluation of a witness' credibility, you have a right to consider anything that has a bearing on the subject of credibility. By that we mean the witness' demeanor on the stand, the witness' manner of testifying, whether the witness impressed you as having a true and accurate [170] memory and recollection of the events about which the witness testified, whether the witness impressed you as being a truthful individual, whether the witness had any motive for not telling the truth, any animosity or bias toward anybody involved in the case.

With respect to the issue of credibility, you may consider whether the testimony is reasonable or unreasonable, whether a witness' testimony has been contradicted or corroborated by other credible evidence in the case.

If you believe that any witness in your judgment showed himself to be biased or prejudiced for or against anybody in this case, either side in the case, then you have a right to determine whether that bias or prejudice affected either the desire or the capability of the witness to tell the truth.

In short, ladies and gentlemen, you have the responsibility of giving to the testimony of each witness such weight as in your good judgment you think that testimony is fairly entitled to receive.

With respect to Dr. William Brownlee, who testified as the Deputy Medical Examiner for the District of Columbia, he was qualified as an expert in pathology and surgery with respect to performing an autopsy to determine the cause of death. And as such he was permitted to give his opinion.

An expert who is qualified in certain areas of competance is permitted to give opinion evidence in the course [171] of a trial. But you ladies and gentlemen of the jury are not bound by his opinion. You should consider his testimony in conjunction with the other testimony and evidence in the case and give his testimony, again, such weight as you determine it's fairly entitled to receive.

If you think that any witness came in here and was sworn before you and wilfully testified falsely with respect to a material fact about which the witness could not reasonably be mistaken, you may, if you want to, disregard all or any portion of that witness' testimony, or you can take such portion or portions you think is worthy of belief.

The burden of proof is on the Government in a criminal case. I told you at the outset that every defendant charged with a crime is presumed to be innocent, and this presumption of innocence remains with the defendant throughout a trial unless and until he or she is proven guilty beyond a reasonable doubt.

And the burden, the obligation is upon the prosecution to prove the guilt of the defendant beyond a reasonable doubt. This burden never shifts from the Government to the defendant. It never shifts from the Government. The Government always has it.

Under our system of law, as distinct from other systems in other countries in the world, under our system of law a defendant is not required to prove his or her innocence. [172] In fact, the law doesn't require in this

country a defendant to give any evidence with respect to a criminal charge placed against them.

So unless the Government proves beyond a reasonable doubt each and every essential element of the offense or the lesser included offense I will get to in a moment with which this defendant is charged, you must find her not guilty.

Reasonable doubt? Counsel repeated this phrase several times in their argument to you, and you have heard me use it several times already: proof beyond a reasonable doubt.

A reasonable doubt, ladies and gentlemen, is exactly what it sounds like. It's a doubt based on reason, a doubt for which you can give a reason. It's the kind of a doubt that would cause a juror after very careful and candid and impartial consideration of all of the evidence to be so undecided that he or she cannot say that he or she has an abiding conviction of the defendant's guilt.

We may put it another way: it's the kind of a doubt that would cause a reasonable person to pause or to hesitate before acting in connection with the more important affairs in his or her own life. A reasonable doubt may arise from the evidence that has been presented in the course of the trial, or a reasonable doubt may arise from the lack of evidence.

However, a reasonable doubt is not a whimsical [173] doubt, it's not a doubt based on conjecture, it's not a doubt based on speculation. I repeat: it's a doubt based on reason.

In a criminal prosecution the Government is not required to prove the guilt of the defendant beyond all doubt or to prove the guilt of the defendant to a mathematical certainty, or to prove the guilt of the defendant by some scientific certainty. The obligation of the Government in the prosecution of a criminal offense, the burden is to establish the guilt of the defendant beyond a reasonable doubt.

And a defendant is never to be convicted on the possibility of guilt or speculation of guilt or some conjecture that he or she may be guilty.

You have heard it argued to you that the defense contends that you may infer from the evidence in this case that Mrs. Agurs stabbed and cut James Sewell in self-defense. The Government contends that the stabbing and the cutting resulting in his death was not in self-defense.

Therefore, I have got to talk with you and give you the instructions with respect to the law of self-defense, because, ladies and gentlemen, if a homicide is committed in self-defense, it's no crime.

So as you consider the evidence in this case, it would seem logical that the first thing that you consider would be that evidence with respect to this self-defense contention. The Government has the obligation, the burden, of [174] proving that the homicide was not committed in self-defense, and it must prove this beyond a reasonable doubt. If it fails to do so, you must acquit Mrs. Agurs.

Now, if Mrs. Agurs had reasonable grounds to believe and actually believed that she was in imminent danger of death or serious bodily injury from Sewell, and that she had to use deadly force to repell such a danger, she was not required to retreat or to consider whether she could safely retreat. She was entitled to stand her ground and use such force as under the circumstances was reasonably necessary to save her life or to protect herself from what Sewell may have been about to do to her.

However, if Mrs. Agurs could have safely retreated and failed to do so, that's a circumstance that you may consider together with the other evidence in the case in determining whether or not she went farther in repelling any attack upon her, whether the danger by this attack was real or apparent and it was necessary for her to do. If she thought that she was in imminent danger of death or serious bodily injury and that deadly force was necessary to repell that danger, she would be justified in using deadly force in self-defense even though it afterwards turned out that the appearances to her were false. She could have used deadly force even though there was in fact neither a purpose nor a design on the part of

Sewell to kill her or seriously injure her, or any imminent danger that [175] this was going to be done, or the actual necessity that deadly force be used in self-defense.

Even if Sewell was the aggressor and Agurs was justified in using force in self-defense, she wouldn't be entitled to use any greater force than she had reasonable grounds to believe and actually did believe were necessary under the circumstances to save her life or to protect herself from great bodily injury.

Now, in determining whether Mrs. Agurs used excessive force in defending herself, you may consider all of the circumstances under which she acted. Now, the claim of self-defense under the law is not necessarily defeated if greater force than would seem reasonably necessary in cold blood is used by a defendant in the heat of passion generated by an assault upon her, because a belief that may be unreasonable in cold blood may be actually and reasonably entertained in the heat of passion.

If Mrs. Agurs was not the aggressor and had reasonable grounds to believe and actually did believe that she was in imminent danger of death or serious bodily injury from Sewell, and she could only save herself by using deadly force against Sewell, she had a right, as I said a moment ago, to use deadly force in order to defend herself. And by "deadly force" we are talking about a force that is likely to cause death or serious bodily injury. [191] But in order for Mrs. Agurs to have been justified in the use of deadly force in self-defense, she must not have provoked the assault upon herself. She must not have been the aggressor.

In this connection, mere words don't ever constitute provocation or aggression. The circumstances under which she acted, including any evidence of intoxication on the part of the decedent, must have been such as to produce in the mind of a reasonably prudent person similarly situated the reasonable belief that Sewell was about to kill her or about to do her serious bodily harm. And in addition, she must have actually believed that she was in imminent danger of death or serious bodily harm and that she had to use deadly force in order to repell this

imminent threat of death or imminent threat of serious bodily injury.

As I have indicated, if you find from the evidence any evidence of self-defense in this case, it's the burden of the Government to prove beyond a reasonable doubt that the defendant did not act in self-defense. If you find, as I indicated, that the Government has failed to prove that the defendant did not act in self-defense, you must find her not guilty. In other words, if you have any reasonable doubt as to whether or not the defendant acted in self-defense, your verdict must be not guilty, because, as I indicated, lawful self-defense is a defense to a homicide. [177] When you have analyzed the evidence with respect to self-defense, and if you find from the evidence that the Government has born its burden with respect to the homicide not having been committed in self-defense, then you will consider whether the Government has proved the essential elements of the offense with which Mrs. Agurs is charged, namely, second degree murder.

Second degree murder is the unlawful killing of one person by another with malice aforethought, but without any premeditation or deliberation. If you have got premeditation and deliberation, we are talking about another crime which is first degree murder. Second degree murder is the unlawful killing of a person with malice aforethought. It may be committed either with or without any purpose or intent to kill if the killing is accompanied by malice, and I will talk about malice in a minute.

The essential elements of the offense of second degree murder, each of which the Government must prove beyond a reasonable doubt, are two:

The first is that the defendant in this case, Mrs. Agurs, in the District of Columbia, inflicted a wound or wounds upon the decedent from which he died. I don't need to elaborate on the evidence with respect to that. You have heard the evidence.

Secondly, the second essential element is that the [178] defendant acted with malice.

Now, in its ordinary use in everyday life the word "malice" would indicate a feeling of hatred or ill will by one person toward another, or a feeling of hostility by one

person toward another. But in its legal sense, malice has a broader significance. Malice does not necessarily imply ill will or hatred or spite or hostility by a defendant toward the person killed.

"Malice" in the law is a state of mind showing a heart that is, regardless of the life and safety of others, a mind that is deliberatedly bent on mischief, a generally depraved, wicked or malicious spirit. Malice as the law knows it is a condition of mind which prompts a person to do a wrongful act wilfully, that is, on purpose, to do injury to another, or to do intentionally a wrongful act toward another without justification or excuse, that is, a wrongful act whose forseeable consequence is death or serious bodily injury.

Malice may be either express or it may be implied. Express malice exists where one unlawfully kills another in pursuance of a wrongful or unlawful purpose without legal excuse.

Implied malice is such as may be inferred from the circumstances of the killing, as, for example, where the killing was caused by the intentional use of fatal force without circumstances serving to mitigate or to justify the act.

[179] In determining whether a wrongful act whose foreseeable consequence is death or serious bodily injury is intentionally done without justification or excuse, and is, therefore, done with malice aforethought, you should, again, bear in mind that it may be inferred that every person intends the natural and probable consequences of his own act or acts. But you are not required so to infer. As I have tried to indicate to you, the intent may be deduced from all of the circumstances that you find in the evidence.

Malice may also be inferred when an act which imparts danger to another is done so wrecklessly or wantonly as to manifest a depravity of mind and a disregard of human life, and such acts results in the death of another human being. But, again, you are not required so to infer.

Would you get Juror No. 7 some water. Better get her another cup, so in case it comes back, she will have some.

Now, the instrument or means by which a homicide has been accomplished is always to be taken into consideration

in determining whether the act is criminal and, if so, in what degree. So if in a prosecution for homicide, it's shown that the accused used a deadly weapon in the commission of the homicide, malice may be inferred from the use of such a weapon. But, again, you are not required to infer malice.

A deadly weapon in the law is any instrument of offense designed to or capable of being used in attacking an [180] adversary and likely to produce either death or serious bodily injury.

Now, if a homicide is committed in the heat of passion caused by adequate provocation, it's not second degree murder. In addition to the adequate provocation, there must be heat of passion caused by that provocation. In other words, both the provocation and the heat of passion must exist at the time of the injury or injuries causing the death are inflicted.

In other words, ladies and gentlemen, a homicide committed in the heat of passion is not second degree murder, and we are talking about second degree murder at this point. Heat of passion which must coincide with the provocation includes rage or resentment or fear or terror. And it may be produced by a combination of these.

Provocation in order to be adequate to acquit this defendant of the second degree murder charge must be such as might naturally induce a reasonable person in the passion of the moment to lose self-control and commit the act on impulse and without reflection. A blow or other personal violence may constitute adequate provocation. But a trivial or a slight provocation entirely disproportionate to the violence of the retaliation is not adequate provocation sufficient to acquit the defendant of second degree murder. And mere words standing alone no matter how insulting, no matter how abusive, no matter how offensive, are not adequate to acquit a defendant of second [181] degree murder on the grounds that he or she was provoked.

The Government has the burden of proving beyond a reasonable doubt that the provocation did not occur in order for there to be a second degree murder conviction, or that any provocation that did occur was not adequate

as a matter of law, or that the defendant, Mrs. Agurs, was not in the heat of passion caused by that provocation. In other words, if you have any reasonable doubt whether or not the defendant acted in the heat of passion caused by adequate provocation, the verdict must be not guilty of murder in the second degree, because, as I repeat, the Government has the burden of proving that the homicide was not committed in the heat of passion caused by adequate provocation in order for there to be a conviction of second degree murder, and this burden must be met, as the Government's burden throughout the case must be met, by the standard of proof beyond a reasonable doubt.

If you determine that the Government has failed to prove the indicted offense of second degree murder, you will then consider whether the Government has proved beyond a reasonable doubt the essential elements of the lesser included offense of manslaughter. There is only one count to the indictment; the indictment charges second degree murder. But a lesser included offense of a second degree charge is manslaughter. It's a lesser degree of homicide.

Now, manslaughter is the unlawful killing of a [182] human being without malice aforethought. Second degree is with malice aforethought. Manslaughter is the unlawful killing of a human being without malice aforethought.

Manslaughter occurs, one, when the homicide is committed at a time of mutual combat. Manslaughter may occur when it's committed in passion or hot blood caused by adequate provocation.

Manslaughter also occurs where a homicide is committed as a result of wrecklessness in conduct by a person involving extreme danger of death or serious bodily injury and a gross deviation from the standard of care or conduct that a reasonable person would observe.

Manslaughter has these five essential elements, each of which the Government must prove beyond a reasonable doubt:

Again, the first essential element is that this defendant, in the District of Columbia, inflicted a wound or wounds upon the decedent James Sewell from which he died.

Secondly, that the defendant stabbed or cut the deceased in sudden passion without malice, or that the defendant stabbed or cut the deceased as a result of wrecklessness in conduct involving extreme danger of death or serious bodily injury and a gross deviation from the standard of care that a reasonable person would observe.

If the jury finds there was sudden passion, then it [183] must also be shown that the sudden passion was caused by adequate provocation.

Lastly, that the homicide was committed without legal justification or excuse.

It's not a defense to manslaughter, as it is to second degree murder, that the homicide was committed in heat of passion caused by provocation. The heat of passion and the provocation must coincide.

And with respect to any homicide that you may find resulting from wrecklessness in conduct involving extreme danger of death or serious bodily injury, I am not talking about a standard based on simple negligence. I am talking about a wrecklessness in conduct which involves an extreme deviation from the normal expectation of human behavior, a gross deviation from normally reasonable standards of conduct that a man or a woman would observe in a particular set of circumstances.

Now, justifiable homicide is the necessary killing of another in pursuance of a legal duty, or, where the person who kills not being himself at fault, had a legal right to kill.

Excusable homicide occurs where the person who kills, although himself or herself at fault, has the legal right so to kill, or where the killing was the accidental result of a lawful act done in a lawful manner.

If you find that the Government has proved beyond [184] a reasonable doubt all of the essential elements of the offense of manslaughter, you may find the defendant guilty of the lesser included offense of manslaughter. If, however, you find from the evidence the Government has failed to prove all of the essential elements of the offense of manslaughter, then you cannot convict the defendant of manslaughter.

There is evidence in this case that after the three employees of Buddies Tourist Home broke into Room 2, the defendant left. Flight by a defendant after a crime has been committed may be motivated by a variety of factors. Flight does not necessarily reflect feelings of guilt, because feelings of guilt may be present in many innocent people and not necessarily reflect actual guilt.

You may, but you are not required to, you may consider any evidence of flight as one circumstance tending to show the defendant's feeling of guilt. You may, but you need not consider feelings of guilt as evidence tending to show actual guilt. But above all, you should not presume guiit from any evidence of flight which you may find in the case. You should consider and weigh the evidence of flight along with the other evidence in the case in determining what weight you are going to give it.

The question of possible punishment in the event of conviction should not enter into your jury deliberations nor affect them in any fashion whatsoever. The duty of imposing [185] sentence in the event of conviction rests exclusively upon the Court. You should weigh the evidence in the case, ladies and gentlemen, in the context of the Court's instructions as to the law and determine this defendant's guilt of innocence solely on a fair evaluation of that evidence and without regard to the question of punishment.

Now, in order to return a verdict, each juror has to agree to the verdict. It's the verdict of each juror. You as jurors have an obligation and a duty to consult with one another in your deliberations and participate in the deliberations, and you should deliberate with a view to reaching a verdict if it can be done without violating your individual conscience with respect to the evidence as you heard it.

Each juror should decide the case for himself or herself, but only after a fair and impartial consideration of all of the evidence and only after participation in deliberation and discussion with your fellow jurors. Don't hesitate to re-examine your view in your exchange in your deliberations. But make your verdict your verdict. You have to be persuaded by the deliberation of other jurors, but you

certainly have a right and you have an obligation to accord them the difference in expressing their views, because each of you has taken a solemn oath with respect to your obligation.

You will retire to the jury room and you will refresh yourselves for lunch, and the marshal will take you to [186] lunch. After you come back from lunch, you will commence your deliberations.

First you select from among your number a foreman or a forewoman, and you may do so in any fashion you choose. The foreman or forewoman presides over the deliberation. That is all the foreman or forewoman does, just somebody has to preside and keep the deliberations going. They have no more weight and no less weight, 12 equal jurors.

When you have arrived at a verdict, there is a deputy marshal right outside the door. He will advise the Court that you have a verdict, and we will take your verdict in open Court.

You are entitled to see all of the exhibits which have been admitted into evidence. If you wish to see all or any one or more of them, you indicate to the Court by a note over the signature of your foreman or forewoman. Give the note to the deputy and he will bring it to the Court and we will have the clerk of the Court see that the appropriate exhibit or exhibits are sent to you.

If for any other reason you have to contact the Court, you may do so, again, by note over the signature of your foreman or forewoman. But do not indicate in any note how you stand with respect to any balloting that may have taken place in the course of your deliberations, because it's nobody's business about your balloting.

[187] Now, we have to excuse the alternate juror at this point. After you have had your lunch, you go back to the jury lounge.

Is there anything further counsel?

MR. CLARKE: May counsel approach the bench, Your Honor?

THE COURT: Surely.

(At the bench:)

MR. CLARKE: I just have one point in the instruction on malice and implied malice, basically. The Court indicated that malice may be inferred from the use of a dangerous weapon. They don't have to infer it, but they could if they want.

I believe in the second grain decision, this is all that has to be done, the added words "without justification or excuse, the use of a dangerous weapon without justification or excuse," I don't think that has to be used in this case because of the circumstances of the case and the other evidence, but I would just like to bring that to the Court's attention.

THE COURT: I think it has been perfectly clear. I think anything more I say to them would just be confusing.

MR. GASTON: I would like to have it left the way it is.

I have something else, if I may, Your Honor. It [188] occurs to me that it might be helpful if the jury were told the order in which they were to consider first self-defense.

THE COURT: I have already told them that. That is they way I gave it to them. I told them the first thing to do when they go in there, didn't I?

MR. CLARKE: Yes, Your Honor.

MR. GASTON: Fine, Your Honor.

THE COURT: I said if it is self-defense, that is the end of it.

MR. GASTON: All right. I have nothing further, Your Honor.

(In open Court:)

THE COURT: Now, one other thing. You have all of the time you need to deliberate on a fair verdict, all of the time that you need. If you have not arrived at a verdict at five minutes to 5:00, we will adjourn your deliberations and start you Monday morning at 9:30.

I make this point clear because I don't want it ever to be said that the jury was pressured into bringing back a verdict, any kind of verdict. You have all of the time you need, all afternoon until five mintes to 5:00, and then

we can adjourn the deliberation and start all over again Monday morning.

All right.

(The jury retires for lunch at 12:41 p.m.)

[189] THE COURT: I think that counsel should stay fairly close. If the only notes that I get from the jury have to do with exhibits, I will merely check the exhibit with the clerk and send it in without calling counsel, unless there is some objection to that.

MR. CLARKE: No objection to that.

THE COURT: Any other note, of course, I will have to talk with counsel, so please stay in close touch with the courtroom clerk,

MR. CLARKE: I will be up in my office this afternoon.

THE COURT: All right. We will stand in recess.

(Luncheon recess taken.)

[190] VERDICT:

(The jury enters the courtroom at 3:03 p.m.)

THE COURT: All right. The clerk will take the verdict.

THE DEPUTY CLERK: Will the foreman please rise.

(Juror No. 4 stands.)

THE DEPUTY CLERK: The defendant rise.

Mr. Foreman, has the jury agreed upon a verdict?

THE FOREMAN: Yes.

THE DEPUTY CLERK: What is your verdict as to the defendant Linda V. Agurs on the charge of second degree murder?

THE FOREMAN: We find the defendant guilty as charged.

THE DEPUTY CLERK: Will all the jurors please rise. Is that the verdict of each and everyone of the jurors?

(The jury responds affirmatively.)

THE COURT: Do you wish to have the jury polled?
MR. GASTON: Yes, please, Your Honor.
THE COURT: Have a seat, ladies and gentlemen.
THE DEPUTY CLERK: Members of the jury, as I call your name, please state whether your verdict is the same as announced by your foreman.

(At this point the jury is polled.)

THE DEPUTY CLERK: The jury has been polled, Your Honor.
[191] THE COURT: All right, ladies and gentlemen. You will return to the jury lounge and they will tell you about your next case.

(The jury leaves the courtroom.)

MR. CLARKE: Your Honor, since this is a District of Columbia Code offense and the new provisions of the District of Columbia Bail Act would apply, the Government would ask that the defendant remain committed at this point.
THE COURT: Mr. Gaston, do you want to be heard?
MR. GASTON: Not at this time, Your Honor. I will consider the matter, and when I feel it appropriate, I would file a motion for release.
THE COURT: All right. The defendant will remain committed, and we will get a probation report and set it for sentencing as soon as I receive the probation report.

(Whereupon the trial was concluded.)

REPORTER'S CERTIFICATE

This record is certified by the undersigned official reporter of the United States District Court for the District of Columbia to be the official transcript of the proceedings indicated.

DOYNE W. SPENCER

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 2081-71

UNITED STATES OF AMERICA

vs.

LINDA AGURS, DEFENDANT

July 24, 1973

Washington, D.C.

Hearing before The Honorable AUBREY E. ROBINSON, JR., United States District Judge.

APPEARANCES:

JOHN O'B. CLARKE, Esq.
Assistant United States Attorney
For the Government

ROBERT I. GASTON, Esq.
For the Defendant

DOYNE W. SPENCER
Official Reporter
4806 U.S. Court House
Washington, D.C. 20001

[2] PROCCEDINGS

THE DEPUTY CLERK: Linda Agurs, Criminal Case 2081-71.

(Defendant not present at 11:52 a.m.)

THE COURT: All right. Mr. Gaston.

MR. GASTON: Your Honor, initially I would like to formally waive the appearance of my client, Mrs. Agurs, in this matter. I do so on the basis that I foresee no prejudice to her in her absence at this hearing. And I think it will further her interests to have the hearing rather than to prolong it, particularly in light of Your Honor's impending vacation.

We are here this morning on a motion that I have filed on behalf of Mrs. Agurs for a new trial. She was convicted of second degree murder.

Subsequently I learned of new evidence showing that the decedent was of a violent character. Specifically, the evidence was a record of convictions for prior violent offenses. This information was obtained from the U. S. Attorney's file on this case.

The evidence is extremely important because it goes right to the issue of who was the aggressor in this particular tourist home room.

Your Honor will recall that the defendant and the decedent went to a room in a tourist home, and shortly thereafter the desk clerk heard screams from the defendant for help. He [3] and two other employees, went to the door of the room and knocked. They were unable to gain entry and the screams continued. They broke the door down and found the decedent and Mrs. Agurs on the bed. The decedent was on top of Mrs. Agurs and they were struggling for a knife which was pointed downward toward Mrs. Agurs at the time. The people broke into the room, pulled the decedent off Mrs. Agurs, and struggled with the decedent for a while before obtaining possession of the knife.

Thus, in light of the defendant's defense of self-defense, the only real issue in the case was who was the aggressor in the room. And that is directly, that is the issue which this new evidence goes directly to.

Under such circumstances, the evidence is admissible under the case of United States vs. Burkes which I referred to in my points and authorities.

Those points and authorities also cited the Brady case which prohibits the prosecution from withholding requested favorable evidence which is material regardless of whether the prosecutor acted in good or bad faith.

I also cite the case of Barbee vs. the Warden of the Maryland Penitentiary, a Fourth Circuit case, which held that it is a denial of due process for the prosecutor to withhold favorable information whether or not the defense requested it, because the defense might not know that it existed.

Then I also refer the Court to the chief judge's [4] concurring opinion in 1965 in the Ellis case where he stated that even where an accused had a lead concerning the newly discovered evidence and didn't follow up, the Government still is not necessarily relieved of its duty to disclose.

Now, in its opposition the Government cites two cases which I would like to discuss briefly.

The first one is the Thompson case, a 1950 case. In that case the newly discovered evidence for which a new trial was sought involved a police record for petty larceny of the Government witness. And in that case the Court set up five standards or five tests which had to be passed in order for a new trial to be awarded on the basis of newly discovered evidence.

Those five elements were: that the evidence discovered, that the evidence be discovered since the trial; that the party seeking the new trial must show dilligence in attempting to procure the newly discovered evidence; that the evidence must not be merely cumulative or impeaching and that the evidence must be material to the issues involved; and that the evidence must be of such a nature that in a new trial it would probably produce an acquittal.

In Thompson the Court found that the second, third and fifth elements—lack of dilligence on the part of the party seeking a new trial, the fact that the evidence was for impeachment, and the fifth one, that the new evidence

would not [5] probably produce an acquittal—were missing, or that they were there, and that was the problem with the case, and the Court denied a new trial on that basis.

Now, Mr. Clarke in this case argues that the defense was not dilligent in attempting to procure this newly discovered evidence, and that there is not a probability of an acquittal if there is a new trial.

On the point of dilligence, I would like to say that, as I stated, the Thompson case is a 1950 case. Since that time, in 1964 the Barbee case was handed down. As pointed out, that held that the Government should turn over reports even though not requested.

Also, our own Court of Appeals, in 1966 in the case of Levin vs. Katzenbach, stated the following: "Ordinarily, a finding of lack of due dilligence will defeat a motion for new trial based only upon the significance of newly discovered evidence." But appellant's "claim for relief based upon a breach of prosecutor's duty of disclosure challenges the fairness and, therefore, the validity of the proceedings, and relief, either on a motion for a new trial or for habeas corpus, may not depend on whether more able, dilligent or fortunate counsel might possibly have come upon the evidence on his own."

As to the probability of acquittal if a new trial were granted, I don't know if that is technically the test of whether or not a new trial should be granted. The Supreme Court [6] ruled in a situation like this that the Court should ask whether it would not be too dogmatic on the basis of mere speculation for any Court to conclude that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before the jury. That is the Supreme Court case of Griffin v. United States, 336 U.S., on pages 708 and 709.

That case came back to our own Court of Appeals in an opinion, 183 Fed 2nd 990, and our own Court of Appeals used that test in deciding whether or not a new trial should be granted.

In this case where the evidence was so close as to who was the aggressor, I think it would be difficult to say

that a jury would not attach significance to the evidence of the decedent's violent character.

The Government also refers the Court to the case of Moore vs. the State of Illinois, stating that Moore rejects the argument to the effect that the defense need not request evidence favorable to the accused, which was the holding, as I stated earlier, in the Barbee case. It is true that Moore does quote from Brady. It quotes the Katzenbach holding which admittedly stated "upon request." But that is all the Court did in that case. It merely quoted the holding in Brady. The Court in Moore refused a new trial, not because the evidence wasn't requested, but because the evidence was immaterial. And that was the basis for the holding in that case.

[7] As a matter of fact, the Court in Moore pointed out that the Government turned over its entire file to the defense prior to trial. So contrary to what Mr. Clarke indicates in his opposition, nowhere that I could find, nowhere in that opinion does the Court specifically reject the argument that the defense need not request the evidence.

In summary, the cases point out again and again that a prosecutor's obligation is larger than merely obtaining a conviction. It is to insure that a trial is fair and that required due process procedures are met so that the innocent are acquitted just as readily as the guilty are convicted.

I have nothing further, Your Honor.

MR. CLARKE: With the Court's permission, Your Honor, as the Government has indicated in its opposition to defendant's motion for a new trial, the decedent in this case did have a record, a record in 1963 for an arrest for assault, I believe it was assault on a police officer, and possession of a dangerous weapon, which resulted in a conviction of simple assault and carrying a dangerous weapon.

In 1971 the decedent also, as we indicated on page 3 of our motion, again ran afoul of the law, in a sense, and was arrested for assault. But at this time he pleaded guilty on April 28, 1971, to carrying a dangerous weapon.

Now, those are the only two indications of prior violence by way of past offenses that the decedent had in his [8] record or against him.

As we also indicated in our motion, during the preparation of the trial by both the defense and the Government, counsel for the defense and counsel for the Government had numerous discussions, at which time both counsel went over their theories of the case. During those discussions it was evident to both parties that neither side considered Mr. Sewell to be a paragon of virtue. This was evident from the fact that he would carry the knife that he had on him at the time of the incident, the knife that was actually used to kill him, the long sheathed knife.

The evidence in the case shows that Mr. Sewell went with Linda Agurs to a motel room during the daytime for obvious acts of prostitution, again, going to show what type of character this individual had.

Now, although the decedent may have had a history of violent acts, the first act was in 1963, approximately eight years before his death, and the second act was about a year or so before his death.

Although he might have had that record, in a sense, the crucial evidence in this case which defeats the materiality of the defense aspects or the defense request for items, the record, is that the decedent was not able to inflict a single mark on the defendant. The defendant would have been the only one to have the knife, if this defendant did have a violent [9] character, it could be assumed that he would have been able to at least inflict a cut or a stab wound upon the defendant before he received the numerous wounds that he did in this case.

Going to the merits of the defense contention besides the materiality of the evidence itself, as I have indicated, defense counsel was well aware of Mr. Sewell's background throughout the discussions that we had together. This was indicated in the Thompson case, a case which the Government relies upon not only to set out standards for judging a new trial motion, but also as a case applicable to the situation in this case.

The defendant could easily have subpoenaed the record of the decedent, especially when they were on notice that

this individual might not have been a completely innocent person, a man without any background at all. They didn't. They didn't take the slightest action to go over and ask for items from the records center, come to Court for a subpoena if that was denied, or even request of the Government any evidence as to the man's prior background.

Now, there is no indication that the Government, if given such a request, would have in any way denied it, would have refused to agree with the defense request, if they wanted to have it.

Now, going to—

THE COURT: Let me interrupt you. This decedent's [10] wife testified in this case.

MR. CLARKE: Yes, she did, Your Honor, Mrs. Sewell testified as to the circumstances, several hours prior to the death.

THE COURT: Was there any reputation evidence at all presented with respect—

MR. CLARKE: None at all, Your Honor.

THE COURT: With respect to the decedent?

MR. CLARKE: None came in.

THE COURT: Was any proffered?

MR. CLARKE: No, Your Honor, there was no proffer one way or the other.

THE COURT: All right.

MR. CLARKE: Your Honor, the Government does rely upon Moore to state the fact that in order to have a Brady violation, there must be a request for the items. There cannot be something that later on appears.

THE COURT: What are you saying? How can you request that which you don't know exists. That is the very essence of Brady.

MR. CLARKE: Yes, Your Honor. But the Supreme Court said in Moore, they faced that in argument and they rejected that argument by specifically holding, the heart of the holding in Brady, the prosecution suppression of evidence in the face of a defense production request. In other words, Your Honor, the [11] Government must be put on notice that the item which the defense requests is favorable to the defense in the sense that the defense would want it.

A. Departure From Normal Rule 33 Standards for Awarding a New Trial on the Basis of Newly Discovered Evidence Is Justified Only When the Prosecutor has Breached a Duty of Disclosure

The relatively stringent standards ordinarily applied in passing upon Rule 33 motions are the product of important policies designed to promote the finality of judgments and conserve the limited resources of the criminal justice system. These standards reflect the balance that has been struck between, on the one hand, the vital need for the criminal justice system adequately to protect against the conviction of innocent persons and, on the other, the desire to avoid unduly depreciating the value of judgments rendered after fundamentally fair trials. The consensus among the courts of appeals on the principles governing such motions evidences a broadly based understanding as to the proper accommodation of these conflicting interests. Therefore, some factor other than the mere exculpatory potential of the newly discovered evidence must enter the analysis before a departure from these rules would be justified. We submit that the only proper occasion for relaxing these standards is when it is found that the prosecution breached a duty to disclose evidence in its possession to the defense.[9]

[9] There is authority, following the leading case of *Larrison* v. *United States*, 24 F.2d 82, 87-88 (C.A. 7), for lowering the normal Rule 33 standard in the case of perjured testimony by a prosecution witness, even though the perjury was unknown to the prosecution and it is deemed blameless for the occurrence. See, *e.g.*, *Gordon* v. *United States*, 178 F.2d 896, 900 (C.A. 6), certiorari denied, 339 U.S. 935; *United States* v. *McBride*, 463 F.2d 44 (C.A. 5), certiorari denied, 409 U.S. 1027. For the reasons discussed in the text, we believe this line of authority is unsound; the discovery of perjury by a prosecution witness logically should be treated no differently from other newly discovered evidence. The Second Circuit recently adopted this view and has declined to continue following *Larrison*. *United States* v. *Stofsky*, No. 74-1860, decided November 7, 1975.

When the prosecutor suppresses evidence in violation of his duty of disclosure, his misconduct may seriously impair the fairness of the trial. In such instances, substantial systemic interests in deterring future prosecutorial misbehavior and in preserving the integrity of the judicial process combine with the defendant's interest in a fair trial to justify the awarding of a new trial upon a reduced showing of the likely impact of the newly discovered evidence. But where there is no evidence of prosecutorial culpability in the conduct of the trial, prophylactic considerations vanish, as do considerations of fairness, and society's strong interests in prosecuting persons legitimately accused of crime and in preserving the finality of criminal judgments require that the normal Rule 33 criteria be satisfied. See *Ross* v. *State of Texas*, 474 F. 2d 1150 (C.A. 5), certiorari denied, 414 U.S. 850.

It is universally recognized that, if the prosecution and the defense both remain in ignorance until after the trial of the existence of a piece of potentially exculpatory evidence that probably would not

have produced an acquittal, a Rule 33 motion for a new trial properly should be denied (see note 7, *supra*). The mere discovery of that same piece of evidence in the prosecutor's files does not, of itself, rationally justify departure from the prevalent Rule 33 standards. Absent breach of a prosecutorial duty of disclosure, the government's possession of information not known to the defense does not denigrate the fairness of the trial. A duty of disclosure may arise under the Constitution, by rule, or by statute, but a finding of the breach of such a duty is a logical prerequisite to relaxation of the Rule 33 requirements.[10]

[10] We recognize that this analysis differs from the conceptual structure adopted by the court below and by the Second Circuit, both of which appear automatically to lower the normal Rule 33 standard whenever the evidence is found in the prosecutor's files, without any separate analysis of whether the prosecutor has breached any duty of disclosure. In the District of Columbia Circuit, as evidenced by the instant case and by *Levin* v. *Katzenbach*, 363 F.2d 287, the prosecutor's possession of the evidence is sufficient to support application of the lowest standard for assessing the sufficiency of the evidence to justify a new trial (the "might have affected" standard). In the Second Circuit, the decisions divide nondisclosures into two categories: in instances of "deliberate" or "intentional" suppression, a new trial is granted "if the evidence is merely material or favorable to the defense" (*United States* v. *Kahn*, 472 F.2d 272, 287); where the nondisclosure is characterized as "inadvertent," a conviction will be set aside only when there is "a significant chance that this added item, developed by skilled counsel as it would have been, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction" (*United States* v. *Miller*, 411 F.2d 825, 832). For the reasons discussed in the text, this linkage of the award of a new trial to the fortuitous

It follows, contrary to the conclusion of the court below, that the post-trial discovery of previously undisclosed evidence in the hands of the prosecution does not justify a precipitous reduction of the Rule 33 standard for assessing the sufficiency of the evidence to support a new trial. Rather, its discovery should prompt an analysis of the prosecution's duty with respect to that particular information. Only after consideration of the origin and nature of the prosecution's obligation and its efforts at compliance is the question of the proper standard for assessing materiality logically presented. See *Levin* v. *Clark*, *supra*, 408 F. 2d at 1217 (Burger, J., dissenting). Moreover, the prosecutor's conduct must be judged on the basis of the circumstances that existed at the time of his acts or omissions, not retrospectively on the basis of unforeseen developments (such as the *Burks* decision).

The court of appeals, however, pretermitted discussion of the prosecution's duty to disclose Sewell's criminal record and of the efforts, if any, required to discharge that responsibility. In so doing, the court ignored the considerations of fairness and deterrence of prosecutorial misconduct that alone can justify departure from the normal standards for assessing newly discovered evidence. It is to the

circumstance that evidence was in the prosecutor's file, rather than to any notion of culpable prosecutorial misconduct, divorces the court's selection of a more generous standard from the policy considerations that justify such action.

correct delineation of the prosecutor's duty of disclosure that we now turn.[11]

B. The Prosecution's Duty to Disclose Evidence to the Defense Normally Is Conditioned Upon a Focused Defense Request

In *Brady* v. *Maryland*, 373 U.S. 83, this Court held that the suppression by the prosecution of evidence favorable to the defendant, despite his request for its production, constitutes a denial of due process of law if the evidence withheld is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.[12] The Court reasoned

[11] Since *Brady* v. *Maryland* and *Moore* v. *Illinois* were state cases, this Court's discussion of the prosecution's duty of disclosure in those cases was necessarily premised on the Due Process Clause. In the argument that follows, we assume that federal courts may impose more stringent, non-constitutionally-mandated standards of disclosure upon federal prosecutors under their supervisory power over the administration of federal criminal justice. But the analytic framework of our argument is not affected by that power. Determination of whether prosecutorial misconduct justifies relaxation of the Rule 33 materiality standard still depends upon a prior consideration of the general scope of the prosecution's duty and the adequacy of its compliance efforts in the particular case.

[12] The "good faith or bad faith" language means, we think, simply that an objective test is to be applied in assessing the prosecutor's acts or omissions, rather than undertaking a subjective inquiry into his state of mind. The language thus does not mean that courts are free to avoid inquiry into whether the prosecutor has breached a duty of disclosure. That the central concern in *Brady* was the unfairness to the defendant resulting from prosecutorial misconduct is evidenced by the Court's derivation of this rule from the principles developed in *Napue* v. *Illinois*, 360 U.S. 264, and *Mooney* v. *Holohan*,

that the prosecutor's act of withholding exculpatory evidence *demanded by the accused* cast the prosecutor in the role of architect of an unjust proceeding and constituted misbehavior of constitutional dimension. *Id.* at 88.

In *Moore* v. *Illinois*, 408 U.S. 786, this Court reiterated the *Brady* standards for determining whether the defendant has been afforded a fundamentally fair trial, again including as one necessary condition a prior defense request for the production of evidence. The Court stated that the following criteria determine whether the prosecution violated its duty of disclosure, thereby necessitating a new trial (*id.* at 794-795):[13]

294 U.S. 103, and their lower court extensions, that the prosecution unconstitutionally deprives the accused of a fair trial by knowingly permitting false testimony to remain uncorrected before the trier of fact, or by contriving a conviction through the knowing use of perjured testimony and the concomitant suppression of favorable evidence. See also *Pyle* v. *Kansas*, 317 U.S. 213; *Alcorta* v. *Texas*, 355 U.S. 28; *Miller* v. *Pate*, 386 U.S. 1.

[13] The decision in *Moore* effectively undermined the precedential value of those authorities that had tentatively interpreted the *Brady* inquiry as turning only on the ultimate possibility of harm to the defendant resulting from the fact of nondisclosure, rather than upon the element of prosecutorial misconduct in failing to respond to an appropriately drafted production request. The leading judicial authority that had espoused this approach was *Levin* v. *Katzenbach*, 363 F.2d 287 (C.A. D.C.), remanded, 262 F. Supp. 951 (D. D.C.), reversed *sub nom. Levin* v. *Clark*, 408 F.2d 1209, 1211-1212 (C.A. D.C.), upon which the court below rested its decision (Pet. App. A, pp. 10a-11a); also compare *Giles* v. *Maryland*, *supra*, 386 U.S. at 99-102 (Fortas, J., concurring

(a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence.

The court of appeals did not find that respondent had made a request for production of decedent's criminal record, nor did it find that the prosecution had intentionally suppressed that evidence. Since there was no defense request, the prosecution's failure to disclose that information did not violate any duty owed to respondent as delineated in *Brady* or *Moore*. We submit that it is not appropriate to expand the prosecutor's duties of disclosure, as did the court of appeals, by jettisoning the request requirement.

The logical implication of the court of appeals' decision is that the prosecution would be required to anticipate, without the guidance provided by a meaningful production request, the possible utility of all evidence in its files arguably somewhat favorable to the defense. Under that analysis, nondisclosure resulting from a failure to appreciate the significance of certain evidence to the defense or to realize that the defendant was unaware of its existence is held to deprive the accused of a fair trial. But the request requirement is an essential element of a *Brady* violation, and its elimination would fundamentally alter the nature of criminal proceedings in both state and federal courts.

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in the judgment), with *id.* at 116-119 (Harlan, J., dissenting).

The prosecution's case files routinely contain many different types of physical and testimonial evidence gathered from multiple sources, much of which will not prove relevant, useful in trial preparation, or admissible into evidence. Since the prosecution cannot entirely foresee the course of the trial and, with limited exceptions not germane to this case,[14] can only speculate about the contours of defenses likely to be raised, the exculpatory character of specific items in its files will not necessarily be apparent to the prosecutor in advance of trial.[15] Moreover, without

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[14] The defendant's privilege against self-incrimination does not prevent him from being required to disclose in advance of trial his intention to rely on certain defenses in which the risks of fabricated testimony are great, such as alibi. *Williams* v. *Florida*, 399 U.S. 78. In federal courts, a defendant is required to notify the prosecution if he intends to rely on a defense based on his mental condition at the time of the crime, Fed. R. Crim. P. 12.2(a), or, upon written demand of the prosecution, if he intends to offer a defense of alibi, *id.* at 12.1(a). If the defendant requests discovery of certain tangible objects, papers and reports, examinations or tests from the government, he is required, upon request, to allow the government to discover from him similar items he intends to introduce at trial. Fed. R. Crim. P. 16(b)(1)(A).

[15] The very nature of criminal proceedings can operate to prevent the prosecutor from being able to disclose useful exculpatory information without a particularized defense request, even though he acts in good faith. The prosecutor's inability to anticipate trial developments may prevent him from determining whether an item of information would prove exculpatory or harmful to the accused until it is considered in light of all the other evidence introduced at trial. See *United States* v. *Keogh*, 391 F.2d 138, 147 (C.A. 2); *United States* v. *Cobb*, 271 F. Supp. 159, 163 (S.D.N.Y.); 8 Moore, *Federal Practice* ¶ 16.06[2], p. 95 (1975 rev.); Nakell, *Criminal*

a reasonably specific request, the prosecutor cannot determine what information is known to the defense and what further evidence might be particularly useful to support its contentions at trial.

If the prosecutor's duty of disclosure is activated, as we think it must be, only when the prosecutor is on notice or chargeable with knowledge of the potential exculpatory significance of matter in his files, then the production request plays an essential mediating role in delimiting the extent of that duty. As Judge Friendly observed, the defendant's request "serves the valuable office of flagging the importance of the evidence for the defense and thus imposes on the prosecutor a duty to make a careful check of his files." *United States* v. *Keogh*, 391 F. 2d 138, 147 (C.A. 2). Moreover, the focusing effect of the request diminishes the prosecutor's burden in reviewing his files and thereby allows him to make a more informed and discriminating assessment of the exculpatory nature of evidence in his possession. *United States* v. *Miller*, 411 F. 2d 825, 831-832 (C.A. 2).[16]

Discovery for the Defense and the Prosecution—The Developing Constitutional Considerations, 50 N.C. L. Rev. 437, 458 (1972). Moreover, the prosecutor, as an advocate, approaches the evidence with a different perceptual framework from defense counsel. Given the prosecutor's burden to prove guilt beyond a reasonable doubt, his natural instinct to emphasize evidence supporting his own position may prevent him from fully appreciating the value of other evidence to defense counsel, who has no burden of going forward, and who may defend by rebuttal and attacks on the credibility of government witnesses on matters unrelated to their testimony against the accused. See *Woodcock* v. *Amaral*, 511 F.2d 985, 990-991 (C.A. 1); Nakell, *supra*, 50 N.C. L. Rev. at 458.

Since the production request alerts the prosecution to the importance of evidence that might not ordinarily command its attention and warns it that the material may not be accessible to the defense, the request reasonably may be expected to affect the standards governing the prosecutor's subsequent compliance efforts. Accordingly, given a proper request, failure to use due care in identifying, assembling, and disclosing exculpatory evidence in its possession may constitute prosecutorial misconduct and therefore justify relaxation of the materiality standard governing the granting of a new trial under Rule 33.

Other important practical considerations support retention of the request requirement. With the knowledge garnered at trial of the identity of the oppos-

[16] For the defense production request to serve its function of flagging the evidence the accused needs to prepare for trial, it must be somewhat narrowly and meaningfully drafted. A general request for all exculpatory information in the government's possession is the functional equivalent of no request, because it provides no basis by which the prosecutor may discriminate between the potentially helpful and the useless information in his files. *United States* v. *Moore*, 439 F.2d 1107 (C.A. 6); *United States* v. *Conder*, 423 F.2d 904 (C.A. 6), certiorari denied *sub nom. Pegram* v. *United States*, 400 U.S. 958; *United States* v. *Brawer*, 367 F. Supp. 156 (S.D.N.Y.), affirmed, 496 F.2d 703 (C.A. 2); see 1 Wright, *Federal Practice and Procedure, Criminal* § 254, p. 515, n. 76 (1969 ed.). *Contra, United States* v. *Baxter*, 492 F.2d 150 (C.A. 9), certiorari denied, 416 U.S. 940; but see *Lee* v. *United States*, 388 F.2d 737 (C.A. 9) (requests before and at trial).

ing witnesses, the controverted issues and the conflicts in testimony, hindsight may show that the defense could have utilized other information effectively. If a mere demonstration that the prosecution's files contained evidence that might have been useful to the defense were sufficient, even absent a defense request, to require a new trial, the prosecutor's pretrial responsibility for screening evidence would be great [17] and the cost of misjudgment prohibitive. The only prudent course in most cases would be simply to throw open those files to the defense prior to trial, even though that practice (which this Court in *Moore*, *supra*, 408 U.S. at 795, clearly indicated is not constitutionally required) would facilitate the fabrication of testimony and intimidation of potential witnesses and give rise to the other evils that have caused discovery to be limited in criminal proceedings. Under any other policy, the risk that some evidence not so disclosed would later be found to require a new trial, under a lenient definition of materiality, would be unacceptably high.[18]

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[17] This burden would be especially onerous for already overloaded urban prosecutorial offices, whose preparation period is generally short and in which different attorneys may handle a case at various pretrial stages.

[18] Indeed, prior to *Moore*, those commentators who considered the presence of a defense request in *Brady* wholly fortuitous had concluded that the practical inability of the prosecution to identify favorable material with precision before trial would force the government to introduce an open criminal files system to prevent reversal under *Brady*. See *Giles* v. *Maryland*, *supra*, 386 U.S. at 101-102 (Fortas, J., concurring in the judgment); Comment, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 Yale L. J. 136, 149 (1964); Nakell, *Criminal Discovery for the Defense and the Prosecution—The Developing Constitutional Considerations*, 50 N.C. L. Rev. 437, 458-461 (1972); Comment, *Criminal Procedure—Disclosure of Prosecutor's Evidence—Disclosure of Favorable and Material Evidence Required Although Procurable by Diligent Defense Counsel*, 42 N.Y.U. L. Rev. 764, 770-771 (1967).

Moore v. *Illinois*, *supra*, refuted this approach, but these works correctly anticipated the necessary implications of the court of appeals' treatment of the request requirement as dispensable in showing misconduct.

Moreover, the approach of the court of appeals in this case unwisely ignores society's legitimate interests in the finality of convictions rendered after fundamentally fair trials by making the validity of criminal judgments dependent upon a post-trial odyssey through the prosecution's files. A general dispensation of the request requirement, especially if coupled with a liberal definition of materiality, would reward the efforts of imaginative defendants who comb the prosecutor's files after the trial, in the hope of uncovering some marginally significant undisclosed information to support a novel theory that arguably "might have" affected the jury's verdict. The defense also would be encouraged itself to withhold possibly exculpatory information at trial and subsequently institute collateral proceedings to attack a conviction on the ground of prosecutorial "suppression" of that same evidence, thus seeking a second opportunity to convince a jury, but with the additional advantage of knowing the prosecution's case in advance. See *Levin* v. *Katzenbach*, *supra*, 363 F. 2d at 296 (Burger, J., dissenting).

The practical necessity of the prior defense request requirement is graphically illustrated by the facts of this case. The nondisclosed evidence clearly was not of sufficient importance to establish an *ipso facto* violation of the prosecution's duty. The record shows (App. 162) that the government's files contained a myriad of factual material, including Sewell's criminal history. The prosecutor and defense counsel stated that they both had considered that history to be inadmissible in proving self-defense. Furthermore, a witness had already informed counsel of the probable existence of the decedent's record. Under these circumstances, the prosecutor's lack of appreciation of the potential utility of this information to the defense cannot be equated to misconduct. A *Brady* request, on the other hand, would have alerted the prosecution to the possible usefulness of that otherwise neutral information, and there is absolutely no reason to suppose that such a request would not have been promptly fulfilled. This case presents a fitting situation for requiring the defense to perform the simple task of tendering a meaningful request for information related to the proposed area of inquiry before the prosecutor's nondisclosure can properly be described as misconduct depriving respondent of a fair trial.

In summary, where the nondisclosed evidence is not of such obvious importance that the prosecution's failure to volunteer it demonstrates active connivance in an unjustified conviction,[19] those courts of

[19] See note 21, *infra*.

appeals that have examined the scope of the prosecution's duty of disclosure, other than the court below, have concluded, following *Brady* and *Moore*, that the presence or absence of a defense production request is a crucial factor in determining whether the prosecution's failure to reveal information tainted the fundamental fairness of the trial.[20] Unless this Court wishes to institute a radical departure from the practice of conducting criminal trial by means of adversarial procedures, the soundness of the majority view should be reconfirmed.[21]

[20] *E.g.*, *Woodcock* v. *Amaral*, 511 F.2d 985 (C.A. 1); *United States* v. *Miller*, 411 F.2d 825 (C.A. 2); *United States* v. *Schembari*, 484 F.2d 931 (C.A. 4); *Ross* v. *State of Texas*, 474 F.2d 1150 (C.A. 5), certiorari denied, 414 U.S. 850; *Clarke* v. *Burke*, 440 F.2d 853 (C.A. 7), certiorari denied, 404 U.S. 1039; *Evans* v. *Janing*, 489 F.2d 470 (C.A. 8); *United States* v. *Baxter*, 492 F.2d 150 (C.A. 9); *United States* v. *Harris*, 462 F.2d 1033 (C.A. 10).

[21] We do not suggest that the absence of a reasonably specific defense request will inevitably foreclose a finding of prosecutorial misconduct sufficient to justify a lowering of the normal Rule 33 standards. There are, we think, two situations in which application of a more generous standard is appropriate. The first is in instances in which it is demonstrated that the prosecution, recognizing certain information to be of central importance to the defense, deliberately suppresses the information or misrepresents to the defense or the court the nature of information in its possession (*e.g.*, *United States* v. *Ott*, 489 F.2d 872 (C.A. 7)). Where such misconduct, involving subjective bad faith action on the part of the prosecution, is established, the goals of deterrence of future prosecutorial misconduct and fairness to the defendant are both furthered by liberality in granting a new trial motion. See *United States* v. *Gerard*, 491 F.2d 1300 (C.A. 9).

The prosecutor may also violate his obligation to ensure that no accused is wrongfully convicted when he fails spon-

III. UNDER ANY STANDARD OF MATERIALITY, RESPONDENT'S CONVICTION SHOULD NOT HAVE BEEN OVERTURNED

We have contended that the sufficiency of the evidence of decedent's criminal record to justify a new trial should have been judged under the "probability of acquittal" standard of Fed. R. Crim. P. 33. But even under the lowest standard, applicable to clear

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taneously to disclose exculpatory information whose high value to the defense could not reasonably have escaped his attention (see, *e.g.*, *United States* v. *Keogh*, *supra*; *Evans* v. *Janing*, 489 F.2d 470 (C.A. 8); *Levin* v. *Clark*, 408 F.2d 1209, 1216 (C.A. D.C.) (Burger, J., dissenting)), although it is by no means clear that misconduct should be found in such cases if the prosecutor reasonably believes that the defense already possesses the information in question. In any event, in at least some cases involving evidence that is both obviously exculpatory and manifestly of high materiality, prosecutorial nondisclosure may reasonably be equated with deliberate suppression (without the necessity of inquiring into subjective good faith or bad faith of the prosecutor).

Since the information regarding the decedent's prior criminal record in this case does not even arguably fall into the foregoing category, we have no occasion here to attempt any more precise delineation of the boundaries of the prosecutor's obligation spontaneously to disclose obviously exculpatory evidence. We note, however, that most cases in which new trials have been awarded despite the absence of a defense request have involved either physical evidence substantially undermining the prosecution's case, *e.g.*, *Barbee* v. *Warden*, 331 F.2d 842 (C.A. 4) (ballistics and fingerprint tests); *United States* v. *Poole*, 379 F.2d 645 (C.A. 7) (medical report on rape victim), eyewitness exoneration of the defendant, *United States ex rel. Meers* v. *Wilkins*, 326 F.2d 135 (C.A. 2), or vital evidence relating to the motives of prosecution witnesses, *e.g.*, *United States* v. *Harris*, 462 F.2d 1033 (C.A. 10); *United States* v. *Gerard*, *supra*.

Brady violations, the nondisclosure of this evidence does not justify affording respondent a new trial.

Neither *Brady* nor *Moore* defined the standard of materiality that the nondisclosed evidence must satisfy to justify a finding of improper prosecutorial conduct, and, consequently, a new trial. That standard was announced in *Giglio* v. *United States*, 405 U.S. 150, in which this Court stated (*id.* at 154; emphasis added, citation omitted):

> A finding of materiality of the evidence is required under *Brady* * * *. A new trial is required if "the false testimony could * * * in any *reasonable likelihood* have affected the judgment of the jury * * *."

The record unambiguously demonstrates that production of the decedent's criminal record could not in any reasonable likelihood have affected the jury's verdict.[22] As discussed by the four judges who dissented from the denial of rehearing *en banc* (Pet. App. D, pp. 20a-21a), the first impediment to the court of appeals' conclusion is that, even had defense counsel been specifically apprised of the decedent's convictions, he would not have attempted to introduce them at trial for, as is undisputed, he had concluded after consultation with another attorney that

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[22] The standard employed by the court below was whether the nondisclosed evidence "might have led the jury to entertain a reasonable doubt about [respondent's] guilt" (Pet. App. A, p. 11a). Whether this test is more lenient than the "reasonable likelihood" standard is a matter of semantics in this case, for under neither standard could this evidence have justified a new trial.

they were inadmissible (Pet. App. A, pp. 4a-5a; App. 160).

Moreover, presentation of the conviction record to the jury would not have meaningfully bolstered respondent's theory of self-defense, which, as noted by the dissenting judges below, was only "conjured by her trial attorney in argument" (Pet. App. D, p. 22a). The trial court charged the jury on self-defense only "[o]ut of an abundance of caution" (App. 179), and it returned a verdict of guilty after twenty-five minutes' deliberation. Whatever slight evidentiary value decedent's two convictions for carrying a knife might have contained was wholly cumulative of information already introduced by the prosecution, showing that he was an unsavory character and was carrying a knife when he registered for the room. Evidence that is merely cumulative cannot justify the awarding of a new trial under Rule 33. See *Mesarosh* v. *United States*, 352 U.S. 1, 9. Nor, we submit, could the probative value of decedent's eight-year-old misdemeanor conviction for assault have been substantial enough to give rise to any reasonable likelihood that a juror's vote would have been changed. See *United States* v. *Miller*, *supra*, 411 F. 2d at 832, n. 14.

Rather, to the extent that it has any evidentiary value, decedent's conviction record depicts an individual familiar with knives and experienced in physical encounters. Introduction of that evidence would have rendered more incredible respondent's claim that Sewell attempted to inflict such bodily

injury that she was justified in using deadly force, for emphasis of his aggressive character could only have heightened the disparity between respondent's claim of self-defense and her emergence from the fatal interlude without the slightest mark.

Decedent's criminal record pales into insignificance when compared with the suppressed evidence held immaterial in *Moore* v. *Illinois*, *supra*. Thus, even if this evidence were considered newly discovered and the most lenient criterion for award of a new trial were applied to this inadvertent nondisclosure, the decision of the court below still must be reversed for failure to make the showing required for a new trial under Rule 33.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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